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BACKGROUND PAPER

ALLEGATIONS OF CHILD ABUSE IN THE CONTEXT OF PARENTAL SEPARATION: A DISCUSSION PAPER

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Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper

Prepared by:
Nicholas M.C. Bala, B.A., LL.M.
Faculty of Law, Queen's University

Joanne J. Paetsch, B.A.
Canadian Research Institute for Law and the Family

Nico Trocmé, Ph.D.
Faculty of Social Work, University of Toronto

John Schuman, LL.M.
Faculty of Law, Queen's University

Sherri L. Tanchak, B.A., B.S.W.
Canadian Research Institute for Law and the Family

Joseph P. Hornick, Ph.D.
Canadian Research Institute for Law and the Family

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EXECUTIVE SUMMARY

INTRODUCTION

The tension, hostility and challenges that arise when parents separate are inevitably heightened if there are allegations of child abuse. If the allegations are true, the child and a supportive parent will suffer; if those allegations are improperly dismissed by the courts as unfounded, the consequences for a child and a supporting parent can be devastating. An unfounded allegation can also have very damaging consequences for a child and the wrongly accused parent. This paper reviews what is known about these very difficult cases, and how our legal and social service systems try to achieve a balance between the various rights and interests that arise. Unfortunately, there is only a limited amount of sound research dealing with allegations of abuse in the context of parental separation, and much of the literature in this area is from countries other than Canada. This report must be viewed as only a preliminary step in trying to understand the nature of the problems that arise and in formulating appropriate responses.

This paper addresses four questions:

- What are the current responses to allegations of child abuse by child protection agencies and the civil and criminal legal systems?
- What are the nature and extent of allegations of child abuse in the context of parental separation?
- What are the key issues associated with false allegations of abuse in this context?
- What strategies could be developed to deal appropriately with this problem?

To address the above questions, a three-part exploratory study was designed and conducted. The first component consisted of a broad literature review of the issues in Canada as well as in other jurisdictions. The second component consisted of a review of the current Canadian legislation and the case law regarding allegations of child abuse in the context of parental separation, as well as a study of reported judicial decisions on Quicklaw databases in Canada from 1990 to 1998. The third component involved interviews with a limited number (14) of selected key informants in Canada and elsewhere regarding their experiences with cases involving false allegations of child abuse in custody and access disputes.

Question 1: What are the current responses to allegations of child abuse by child protection agencies and the civil and criminal legal systems?

All Canadian jurisdictions have laws that encourage or require the reporting of suspected child abuse to a child protection agency (or the police), so that the authorities can investigate and take steps to protect the child if the child is actually at risk. In all jurisdictions, except the Yukon, a person who has *reasonable grounds* to believe that a child is at risk of abuse is obliged to report it to a child protection agency (or the police). These reporting laws require only "reasonable suspicions." If a parent discloses suspicions of abuse to a doctor, social worker, or therapist, that professional is required by law to report this. In some provinces, like Ontario, only a professional who fails to report can be punished under provincial reporting laws. A person who *in good faith and on reasonable grounds* makes a report of child abuse has immunity from civil suits.

Chapter 2.0 describes the investigation of and legal response to a report of child abuse. A critical initial question when abuse is alleged is to determine whether contact between the alleged abuser and the child should be restricted. From the reported case law, it appears that when there is an allegation of abuse, especially sexual abuse, most judges will tend to "err on the side of caution" pending a full hearing. Interim hearings are generally decided on the basis of affidavits from parents and any investigators or others who have been involved in the case. At this stage, there is little opportunity for the accused parent to challenge the allegation, though there are a few reported cases in which judges have decided even at the interim stage that the evidence to support the allegation is so weak that unsupervised access may continue.

While an investigation into allegations of child abuse is ongoing, there are several options available regarding access to the child by an accused parent. Depending on the assessment of risk to the child, if the accused parent has custody of the child, then the child may be apprehended by child protection authorities. If the accused parent does not have custody of the child, a court acting under child welfare legislation, family law legislation, or even the *Criminal Code*, may deny access or require supervised access.

Canadian judges are not consistent in dealing with the problem of uncertainty in family law trials involving abuse allegations. Most judgements require that the person making the allegation prove to the court that it is more likely than not that the abuse occurred—the civil standard of proof on the balance of probabilities. However, some cases take account of situations where there are "serious concerns" about abuse, but the judge is unable to make a clear finding that abuse has occurred. In all cases where a judge is deciding on custody or access, the best interests of the child are a primary focus.

In theory, a person who *knowingly* makes a false allegation of sexual abuse may be committing a number of offences under the *Criminal Code*. A person who knowingly makes a false statement to a police officer accusing another person of committing a crime (including child abuse) commits the offence of mischief, contrary to section 140 of the Code. If the false allegation resulted in a civil or criminal proceeding in which the person who made the allegation testified, other offences might be committed, including perjury (giving false evidence under oath, section 131), or making a false affidavit (section 138). If the reporter persuaded or misled the child or another person to make a false statement, this would be obstruction of justice (section 139). However, given the criminal standard of proof and the difficulty of proving that the person who made the statement knew it was false, there are very few charges laid under any of these sections in any context.

There have been a number of highly publicized cases in Canada in which individuals have claimed that they have been wrongfully accused of sexual abuse by "overzealous" investigators, and have sought redress in the courts. In most cases, these individuals have been satisfied with an acquittal in criminal court, or a finding in a civil proceeding that refutes the abuse allegation. However, in a few cases individuals have sued investigators for monetary damages to compensate for the expense and emotional anguish caused by the negligent investigation which resulted in their being wrongfully alleged to have abused their children.

Question 2: What are the nature and extent of allegations of child abuse in the context of parental separation?

Strong concerns were raised during the public hearings of the Special Joint Committee on Child Custody and Access about deliberate false allegations being a substantial and growing problem. Some witnesses suggested that false allegations were being used as a tactical weapon by a large number of family law litigants and warned that it was becoming a practice condoned and sometimes even encouraged by some women's shelters, child welfare workers and lawyers. The issue of false allegations of abuse in the context of parental separation was examined by reviewing the research literature in this area, reviewing relevant findings from the Ontario Incidence Study (OIS) of Reported Child Abuse and Neglect, reviewing Canadian case law, and through key informant interviews.

The lack of research studies, particularly Canadian studies, means we do not know the actual incidence of abuse allegations in cases in which parents have separated, or the proportion of cases in which the allegations are intentionally false. However, it appears from Canadian and American studies, as well as information obtained from the key informants, that allegations of physical or sexual abuse occur in a relatively small portion of cases in which parents have separated. Some research suggests that abuse may be an issue in less than two percent of separations, though other research suggests that in some locales abuse allegations might occur in five to ten percent of contested custody and access cases. We also do not know if the rate of false allegations of abuse is higher in the context of parental separation than in other situations. Both the research literature and the key informants were mixed on this issue.

A critical issue in any discussion of allegations of child abuse is the difference between a false allegation that is deliberately made to gain a tactical advantage in a custody or access dispute, and an unfounded allegation that is made due to an honest mistake. An intentionally false allegation (or fabricated allegation) is an allegation of child abuse that is known by the accuser to be false but is deliberately made, whether or not maliciously, to gain a tactical advantage in a custody or access dispute, or to seek revenge on or punish a former spouse. A false allegation that is made due to an honest mistake can occur for a number of reasons, such as children's statements being misinterpreted, poor communication between the parents, or poor interviewing techniques. A false allegation may also be a result of mental disturbance or mental illness of the accusing parent. An investigation into an allegation of child abuse may yield no conclusive evidence, and thus no determination can be made of the allegation's validity; we have termed this situation undetermined or unsubstantiated. It is apparent from the research reviewed that a majority of cases of unfounded allegations arose not because of deliberate fabrication by an accusing parent, but because of poor communication, misunderstanding or honest mistakes.

Question 3: What are the key issues associated with false allegations of abuse?

The information in this report was obtained from a variety of sources: a literature review of available research information in Canada and other jurisdictions; a review of the current Canadian legislation and case law regarding allegations of child abuse in the context of parental separation; and key informant interviews with a limited number of practitioners regarding their experiences with cases involving allegations of child abuse in situations where parents have separated or divorced. Based on this information, a number of significant issues can be identified:

Research Issues

- Incidence of false allegations of child abuse.
- Incidence of false allegations of child abuse in the context of parental separation.

Investigative Issues

- Need for education and training for professionals.
- Length of time required to investigate cases involving allegations of child abuse.
- Availability of protocols for investigating these cases.

Legal Issues

- Unfounded allegations: misunderstanding, fabrication or mental disturbance?
- Children initiating false allegations.
- Effect of unfounded allegations on family law decisions, such as custody and access.
- Dealing with the uncertain outcome.
- Children's evidence in family law cases—the admission of hearsay evidence.
- The role of assessors and experts.
- Are stronger legal remedies required to prevent false allegations?
- Would stronger legal remedies discourage legitimate reports of abuse?
- Balancing the interests of children with the rights of the parent.

Social Service Issues

- The role of therapists and counsellors in making false allegations.
- Are the resources for supervised access adequate?
- Should supervised access workers provide assessment and treatment services?
- Increased costs to process cases involving allegations of abuse.

Education and Training Issues

- Dynamics and characteristics of founded and false allegations of child abuse.
- Lack of training for professionals involved in investigating cases of alleged abuse.

Question 4: What strategies could be developed to deal appropriately with this problem?

There are a number of issues related to allegations of child abuse in the context of parental separation. In developing strategies to deal with these issues, it is important to recognize that some problems are inherent in this type of case (e.g., cases will continue to be time consuming to investigate due to their complexity and cases will continue to be expensive to process). The only way to address these issues is to reduce the incidence of false allegations.

Some issues, primarily those dealing with education or training needs, can be addressed now. All professionals working with cases involving allegations of abuse, including child welfare workers, police, psychologists, lawyers and judges, need educational materials or training in dealing with high conflict separations, particularly with the special challenges that arise when allegations of abuse are made. This education should be ongoing, and updated as new research information is available. Further, parents should be provided with information about the dynamics of parental separation and its effects on children. General information about abuse should be provided as part of "parenting after separation" education programs, with more detailed information given to individual parents as appropriate.

There are some issues that we do not yet have enough information about (particularly Canadian information) to make informed policy decisions. These issues require research and study before appropriate responses can be formulated. Issues such as whether stronger legal remedies for dealing with false allegations are required cannot be properly addressed without undertaking further research.

1.0 INTRODUCTION

1.1 The Problem

Few issues are as emotionally charged as those surrounding allegations of child abuse, particularly when they occur in the context of parental separation. Stories in the media of fathers being denied access to their children due to accusations of child abuse were reported to the Special Joint Committee on Child Custody and Access, which began hearings in 1998. Headlines such as "Divorce law 'Hell' for Dads; Urgent reform needed, MP says,"[1] "Senator fights to even the odds in child-custody battles,"[2] "Sex-abuse allegation a perfect ploy: Some mothers accuse dads to keep custody of kids,"[3] "Silver Bullet: When parents fight for control of the children, a sex-abuse allegation is the ultimate weapon,"[4] "'Abuse' becoming weapon of choice on the marital battlefield,"[5] "Senator outraged by lies in abuse cases,"[6] and "Men's groups urge caution with abuse law"[7] may give the impression that the problem of false allegations of child abuse in the context of parental separation is very widespread.

Unfortunately, the actual incidence in Canada of allegations of child abuse in the context of parental separation is not known. However, it appears that a relatively small portion of all contested parental disputes raise abuse issues. Some professionals believe that the incidence of false allegations is higher in cases where parents have separated than in other contexts, but even this has not been clearly established. It is clear, however, that many abuse allegations in this context are well-founded, and that any abuse allegation needs to be taken seriously. In some situations, abuse may have commenced while the family was intact, but this was not disclosed by the child until after separation. In others, abuse may have begun only after separation, or may be perpetrated by a parent's new partner. While some false allegations after separation may be the product of deliberate manipulation by one parent, the majority of unfounded allegations do not appear to be deliberate fabrications. Distrust or hostility between parents may result in misunderstandings that lead to false allegations, especially in cases where the children involved are young and the allegations are reported through a parent.

As explained by Leonoff and Montague (1996: 357), unfounded accusations are most often multi-causal and are rarely simply the conniving manipulation of a competitive parent who wishes to win at all cost. There is a gradient between the parent who consciously deceives and the one who is deluded in belief and whose accusations are built of several elements:

- personal history projected onto the present relationship;
- shock and betrayal turned into malevolent mistrust of the other;

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[1] *Toronto Sun*, April 12, 1998.
[2] *The Spectator* (Hamilton), March 9, 1998.
[3] *The Spectator* (Hamilton), February 15, 1997.
[4] *The Spectator* (Hamilton), February 15, 1997.
[5] *The Edmonton Journal*, February 3, 1997.
[6] *The Calgary Herald*, November 29, 1996.
[7] *The Edmonton Journal*, October 22, 1996.

- aggression and hatred;
- fears based on regressed violent behaviour at the termination of the marriage;
- comments made in emotional turmoil;
- suggestibility enhanced by outsiders who are keen to find sexual abuse in men;
- wishes to denigrate, humiliate and punish the former-spouse;
- distortion in thought processes in mentally vulnerable parents who view their overreactions as protectiveness; and
- a fervent desire to win a custody case and be rid of that person forever.

Parental custody and access disputes are often emotionally charged and difficult for everyone involved, including parents, children and professionals. The adversarial nature of the litigation process may result in exaggerated statements in affidavits and other court documents. If there are allegations of abuse, the emotional tension, bitterness and complexity that are present in all custody and access disputes are invariably heightened. These cases can be very challenging for all of the professionals involved: lawyers, judges, police, social workers, mediators, and mental health workers. There is no valid psychological test or profile that can conclusively determine whether an accuser, an accused or a child is telling the truth about an allegation. There may be a number of mental health professionals and social workers involved in a case, with differing levels of involvement and expertise and conflicting opinions about the case. It may be very difficult to prove conclusively that abuse did or did not occur.

Once the issue of abuse is raised, a number of agencies with differing mandates may become involved in a case. There is the potential for a child welfare investigation, a parental custody or access family law case, a criminal prosecution, and a civil action to be proceeding at the same time in different courts, adding to the complexity, expense and stress. In practice, however, criminal or child protection proceedings are most likely in cases where there is clear evidence of abuse. Cases in which there is greater uncertainty about whether abuse occurred are most likely to be dealt with in family law proceedings.

Many issues arise in the investigation of child abuse allegations made in cases where custody and access are being disputed. Some of the key issues are:

- Is a clear distinction drawn between an allegation that is proven to be false, and a claim that is not proven true or false (i.e., an unsubstantiated allegation)?
- Is a false allegation of child abuse being deliberately made to gain a tactical advantage in a custody or access dispute?
- Is a child's statement or other information being honestly misinterpreted as indicating abuse because of the level of mistrust or the poor communication between the parents?

- Who is making the allegation?

- What is the factual basis of the allegation?

- Did the abuse allegedly occur prior to separation and only come to light after separation, or did it begin after separation?

- Are access rights of non-custodial parents being denied during investigations? If so, why and for how long?

- Are false allegations of child abuse being made repeatedly in the same case?

- Are children being coerced and manipulated by custodial parents to make accusations against non-custodial parents?

In addition to the issues related to investigation, there are significant public policy issues that arise in connection with false allegations of abuse where parents have separated, including:

- Does the problem of false allegations require statutory responses, justice system reforms, changes in social services, or more education for professionals?

- Would legal sanctions for the making of false or unproven reports have the effect of discouraging legitimate reports of abuse?

1.2 Purpose of Discussion Paper and Questions Addressed

The tension, hostility and challenges that arise when parents separate are inevitably heightened if there are allegations of child abuse. If the allegations are true, the child and a supportive parent will suffer, and if the courts improperly dismiss those allegations as unfounded, the consequences for a child and a supporting parent can be devastating. An unfounded allegation can also have very damaging consequences for a child and the wrongly accused parent. This paper reviews what is known about these very difficult cases, and how our legal and social service systems try to achieve a balance between the various rights and interests that arise. Unfortunately, there is only a limited amount of research that deals with allegations of abuse in the context of parental separation, and much of the literature in this area is from countries other than Canada. This report must be viewed as only a preliminary step in trying to understand the nature of the problems that arise and formulate appropriate responses.

This paper addresses the following four questions:

(1) What are the current responses to allegations of child abuse by child protection agencies and the civil and criminal legal systems?

(2) What are the nature and extent of allegations of child abuse in the context of parental separation?

(3) What are the key issues associated with false allegations of abuse?

(4) What strategies could be developed to deal appropriately with this problem?

1.2.1 Strategy for the Discussion Paper

To address the questions listed above, a three-part exploratory study was designed and conducted. The first component consisted of a broad literature review of the issues in Canada as well as other jurisdictions. The second component consisted of a review of the current Canadian legislation and case law regarding allegations of child abuse in the context of parental separation, as well as a study of reported judicial decisions on Quicklaw databases in Canada from 1990 to 1998. The third component involved interviews with a limited number (14) of selected key informants in Canada and the United States regarding their experiences with cases involving false allegations of child abuse in custody and access disputes. The purpose of these interviews was to check the relevancy of the findings of the other two study components, particularly the non-Canadian information. Key informants included practitioners working in the field, such as child welfare workers, supervised access program workers, police, lawyers, judges, and researchers (Appendix A contains a copy of the interview protocol).

1.2.2 Limitations

There are several limitations to the information presented in this paper that should be acknowledged. First, due to the lack of relevant Canadian studies, the literature reviewed is primarily American and may not be totally applicable to the Canadian context. Second, Canadian data are from specific jurisdictions within Canada, and cannot necessarily be generalized to the whole country.

Third, the study of reported judicial decisions dealt only with family law cases; child protection and criminal cases were excluded. Quicklaw databases depend on receiving written decisions from judges, and many decisions delivered in Canada are not included in legal databases. Most family law judicial decisions do not result in written reasons and do not appear on legal databases, which may mean that certain types of decisions are under-represented in the legal databases. Despite this, there is no more complete set of written judgements than the Quicklaw databases. This study, at the least, gives a sense of what is happening in many of the highly contentious cases that family law judges in Canada decide.

Fourth, the key informant interviews were very limited in number and cannot be taken as representative of the various professions interviewed. Information from these interviews is included throughout this paper, however, to reflect the practical experience of some professionals who deal with allegations of abuse in the context of parental separation, and to illustrate common Canadian investigative practices and procedures.

Finally, the legal system and related support services are evolving, and the data collected for this paper reflects developments and understandings at the end of 1998.

This paper is only a preliminary look at a very complex set of interrelated issues and should not be taken out of that context.

1.3 Definitions of Investigation Outcomes

A critical issue in any discussion of allegations of child abuse is the difference between a false allegation that is deliberately made to gain a tactical advantage in a custody or access dispute, and an unfounded allegation that is made due to an honest mistake. In this paper, we try to make this distinction clear. However, there is a lack of consistency in the literature and case law in the terms used to describe the outcome of an investigation into an allegation of child abuse. For the purpose of this discussion, we use the following terms and definitions for the possible outcomes of an investigation:

Intentionally False Allegation

An intentionally false allegation (or fabricated allegation) is an allegation of child abuse that is known by the accuser to be false but is deliberately made, whether or not maliciously, to gain a tactical advantage in a custody or access dispute, or to seek revenge on or punish a former spouse. An example of an intentionally false allegation would be a custodial mother who makes up a story that her child is being abused by her former spouse because she does not want the father to have access to his child, and tries to manipulate or indoctrinate the child to support this allegation.

False Allegation Due to Honest Mistake

A false allegation due to an honest mistake can occur for a number of reasons, such as children's statements being misinterpreted, poor communication between the parents, or poor interviewing techniques. Poorly trained assessors or investigators may contribute to this problem. An example of a false allegation due to an honest mistake would be a custodial mother who misinterprets her three-year-old daughter's red vagina after a visit with the father as evidence of sexual abuse rather than a reaction to the strong soap used during a bath, and misunderstands her child's explanation.

False Allegation Due to Mental Health Problem of Accuser

A false allegation may be a result of mental disturbance or mental illness of the accuser. In most of these cases, the accuser is a parent.

Undetermined (Unsubstantiated) vs. Unfounded

An investigation into an allegation of child abuse may yield no conclusive evidence, and thus no determination can be made of the allegation's validity. We have termed this situation undetermined or unsubstantiated. Such a case may be reinvestigated at a later time if additional evidence is presented. We distinguish the "undetermined" case from the "unfounded," which is a case where there is a clear determination that the allegation is false, although some authors and judges use the terms interchangeably.

Founded (Civil Standard of Proof)

If an allegation of child abuse is said to be founded using the civil standard of proof, this means that proof of the allegation was established on a balance of probabilities (or preponderance of evidence). This is the standard of proof used in custody and access disputes (family law cases) and under child welfare legislation.

Founded (Criminal Standard of Proof)

If an allegation of child abuse is said to be founded using the criminal standard of proof, this means that proof of the allegation, hence guilt, has been established beyond a reasonable doubt. This standard of proof is used when criminal charges are tried.

The distinction between intentionally false allegations and false allegations due to honest mistakes or mental health problems is very important, although many studies, and therefore the statistics, do not differentiate false allegations by their source. Ceci and Bruck (1995: 31), for example, argue that rates of false allegations should include honest mistakes as well as deliberate lies because honest mistakes "can do just as much harm." While this assertion has considerable force from the perspective of the alleged perpetrator, the distinction between the intentionally false allegation and the honest mistake is vitally important. There are very significant differences in how children may be affected in these situations, and the consequences for the accusers of each type should be very different.

2.0 CURRENT RESPONSES TO ALLEGATIONS OF CHILD ABUSE

This chapter focuses on the first question for discussion: What are the current responses to allegations of child abuse by child protection agencies and in the civil and criminal legal systems? The investigation and legal response to a report of child abuse are briefly described below.

All Canadian jurisdictions have laws that encourage or require the reporting of suspected child abuse to a child protection agency (or the police who will then contact the agency) so the agency can investigate and take steps to protect the child if the child actually is at risk. In all jurisdictions in Canada, except the Yukon, a person who has *reasonable grounds* to believe that a child is at risk of abuse is obliged to report. These reporting laws require only "reasonable suspicions." If a parent discloses suspicions of abuse to a doctor, social worker, or therapist, that professional is required by law to report this. In some provinces, like Ontario, only a professional who fails to report can be punished under provincial reporting laws. A person who *in good faith and on reasonable grounds* makes a report of child abuse to a child protection agency has immunity from civil suit, even if it turns out that the report was unfounded, and as a result might, in other circumstances, be considered to be an act of defamation (slander).

2.1 Child Protection Agency Involvement

When a parent believes that his or her child has been abused, a child protection agency is likely to become involved in the case. Sometimes the accusing parent contacts the agency; in other situations the parent may first contact a doctor or mental health professional, who will then be obliged under child abuse reporting laws to report a *suspected* case of abuse. When a child protection agency begins an investigation of suspected abuse, it is likely to want to take steps to ensure the immediate safety of the child.

If, for example, the allegation is against an access parent, the agency may go to court under child protection legislation to suspend visitation by the parent suspected of child abuse. Commonly, though, the agency will "request" a voluntary suspension or supervision of access, with the threat of court if there is no agreement. The suspected abuser will generally want to appear co-operative, and may be informed by a lawyer that a court is also likely to "err on the side of caution" at this initial stage and may agree to restrictions on contact with the child.

Investigations of suspected abuse by access parents are often complex cases, requiring careful assessment, and the investigation may take months to complete. If the agency concludes that abuse perpetrated by a parent has occurred, the agency generally has legal authority to seek some kind of court order to protect the child.

Although practices vary between agencies, if the parents have already commenced family law proceedings (i.e., seeking a custody or access order), the agency often decides not to bring a child protection application to court. Instead, it will rely on the accusing parent to seek a judicial determination and order which will protect the child. In some cases, the agency may encourage the accusing parent to bring a family law application. It may even threaten that if the accusing parent fails to take adequate measures to protect the child, the agency will bring a protection application that may result in the child being placed in agency care or under its supervision.

Even if the agency has not made a court application, the agency workers may still testify in the family law case, or may be asked to supervise access visits by the alleged abuser.[8] However, there are cases in which the accusing parent may decide not to pursue family law proceedings, usually for financial reasons, or the agency may have special concerns and decide to commence child protection proceedings.[9]

If the evidence of abuse is weak and the case considered unfounded by the agency, or the allegations of abuse are less serious, the agency may decide that no further action on its part is warranted. The accusing parent may still proceed with the family law case, and protection workers may be called to testify, perhaps by the accused parent.

2.2 Criminal Justice System Involvement

If a child protection worker believes there is strong evidence of serious abuse, the worker, in addition to taking protection steps, is likely to contact the police to allow them to investigate and decide whether criminal charges should be laid. In many communities there is a "protocol" to direct how a joint investigation is to be conducted. Occasionally a parent who is alleging abuse in the context of parental separation will directly contact the police. Frequently in cases arising out of parental separation, the police are only informed and investigate a considerable time after the child has made the initial alleged "disclosure," complicating the police investigation. Given the nature of the criminal process, it is only when there is very strong evidence of abuse that criminal charges will be laid, and it is relatively uncommon for there to be simultaneous criminal and civil proceedings, though this does occur.

It is much more difficult to prove abuse in a criminal proceeding than in a civil proceeding. For a criminal conviction, there must be proof beyond a reasonable doubt, while a civil case only requires proof on the balance of probabilities. Further, the criminal rules of evidence and the *Canadian Charter of Rights and Freedoms* may exclude some evidence in this type of proceeding that would be admissible in a civil trial, like child protection or family law proceedings. There is, for example, much more scope in a civil case for the admission of hearsay evidence about a child's out-of-court disclosures of abuse.

Judges in criminal cases are generally aware of the dynamics of parental separation, and are likely to be sensitive to the *possibility* of allegations being fabricated or exaggerated. It is not uncommon for a judge in the criminal trial to acquit the accused, but emphasize that this is being done because of the high criminal standard of proof, and to express concerns that the child may well have been abused by the parent.[10]

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[8] In some family law cases where there are abuse concerns, the court will order that access should be supervised by a child protection agency (see e.g., *Beckett* v. *Beckett*, [1995] O.J. 2185 (Gen. Div.) Kent J.). Though agencies are sometimes willing to do this, they may lack resources and there is doubt as to whether the agency can be *required* to supervise access unless there is a child protection application (see *Levesque* v. *Levesque* (1983), 54 B.C.L.R. 164 (B.C.C.A.)), or legislation requires the agency to comply with judicial supervision orders.

[9] In some jurisdictions, the rules of court permit one judge to deal with the family law proceeding and a child protection application at the same time, reducing the expense for all involved. However, the accused parent may consider it unfair to have to litigate against both the other parent and a state agency in the same proceeding.

[10] See e.g., *R.* v. *J.C.P.*, [1998] O.J. 3883 (Gen. Div.); *R .v. B.L.*, [1998] O.J. 2522 (Gen. Div.).

If criminal charges are laid, they will tend to dominate the resolution of any family law proceeding, at least until the criminal charges are resolved. A usual condition of the judicial release of the accused in the community pending a criminal trial will be denial of contact with the alleged victim, or at least close monitoring of access. In some cases, the criminal court judge will release the accused with a condition that there be no contact with the child unless permitted by the order of a family law proceeding judge. The *Canadian Charter of Rights and Freedoms* guarantees that a criminal trial be held within a reasonable time, and a criminal trial will usually be held before civil proceedings are fully resolved.[11]

If there are simultaneous criminal and family law proceedings, the person accused of abuse will often have separate lawyers for each proceeding, though it is highly desirable for these two lawyers to communicate and co-ordinate their efforts.[12] Defence counsel in the criminal case will generally be reluctant to allow a person charged with a criminal offence to testify in a civil case that deals with the same issues, and will want any civil proceedings adjourned until the criminal case is resolved. If the accused files an affidavit or testifies in the civil case (for example, in an interim access application), the Crown prosecutor may use any inconsistencies between that affidavit and testimony in a later criminal trial to attempt to impeach the credibility of the accused.[13] Similarly, if the accusing parent testifies in the criminal trial, any inconsistencies between that testimony and evidence in a later family law trial may be used to impeach the credibility of that person.

If the accused is convicted of abuse in the criminal trial, a judge in a family law trial held after the criminal trial is likely to take the criminal conviction as very strong or even conclusive evidence that the abuse occurred.[14] In theory, the fact that a person abused a child does not determine whether it is in the "best interests" of the child to lose contact with the perpetrator. However, in practice, if the accused is convicted of child abuse in a criminal trial, there is little likelihood that there will be any family law hearing on the issue of whether abuse occurred, and the convicted abuser is unlikely, at least immediately, to seek visitation rights to the child.

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[11] If the civil case comes to trial before the criminal case, it is possible for the accused to seek a stay of the civil trial, but judges are reluctant to grant a stay, especially if this would delay the making of a decision about the best interests of the child: see e.g., *Forbes* v. *Througlow* (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.).

[12] See e.g., Todd White, "Spousal Abuse Issues and Their Impact on the Resolution of the Family Law Case" and H. Niman & J. Pirie, "How to Deal with Allegations of Spousal Assault in a Family Law Case" in Canadian Bar Association - Ontario, *Family Law Institute*, (Toronto, January 1999).

[13] The *Canadian Charter of Rights and Freedoms*, section 13, creates a right against self incrimination, so prior affidavits or testimony of an accused cannot be used *if* the accused does not testify. However, if the accused does testify in the criminal trial, the prior statements from the family law proceedings can be used to impeach his credibility; see e.g., *R.* v. *B.(W.D.)* (1987), 38 C.C.C.(3d) 12 (Sask. C.A.); and *R.* v. *Kuldip* (1991), 61 C.C.C. (3d) 385 (S.C.C.). Counsel in the civil case may try to get an order for the sealing of the civil trial record until after the criminal case is over to prevent any use of the material in the civil case; see e.g., *Forbes* v. *Througlow* (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.) where such an order was made.

[14] In ordinary civil cases, judges have held that since the parties to a civil case are not the same as those in a criminal case, the criminal conviction is only *prima facie* evidence of guilt and the accused may in theory attempt to re-litigate the issue in a later civil trial; *Taylor Estate* v. *Baribeau* (1985), 51 O.R.(2d) 541 (Div. Ct.). See, however, *D.E.* v. *O.L.*, [1996] O.J. 3136 (Prov Div) which applied the doctrine of "issue estoppel" to prevent the accused from re-litigating the issue of abuse after a criminal conviction at a later interim access hearing and terminated unsupervised access. See also *Demeter* v. *British Pacific Life Insurance* (1984), 13 D.L.R. (4th) 318 (Ont. C.A.) which held that in some circumstances it may be an "abuse of process" to allow a person convicted of an offence in a criminal trial to re-litigate the issue of guilt in a later civil case, particularly if the primary purpose of the civil case is a collateral attack on the criminal conviction.

The fact that an alleged abuser is not charged, or is tried and acquitted in criminal court, is not binding on a judge in a civil proceeding. It is common for an alleged abuser to be acquitted in criminal court and then have the allegations of abuse litigated again in a family law trial, where the rules of evidence and the standard of proof make it easier to prove that abuse occurred. Sometimes the criminal charges against the alleged abuser are dismissed due to a violation of his rights by the police or Crown under the *Charter*; this type of dismissal does not prevent a judge in family law proceedings from considering the abuse allegation.[15] Further, even if there is no positive finding, in either the criminal or the family law proceeding, that the alleged perpetrator abused the child, there may be other concerns about the parenting capacity of a person acquitted in criminal court that lead to a denial of custody.[16]

While a criminal conviction for child abuse will often result in the termination of access, a judge in a family law case must consider whether it is in the "best interests" of a child to continue or resume contact. Children who have been sexually or physically abused by a parent will often feel an attachment to that parent, despite the abuse. A family law court may allow access by a convicted abuser if it is satisfied that this is in the child's best interests. The judge should be satisfied that the children will not be at risk, which may require supervision, especially at first, and evidence of rehabilitation. The judge should be satisfied that the visits will actually promote the welfare of the child, and not simply allow access based on some notion of parental rights.[17]

If the alleged abuser is not found guilty in the criminal process, there may be a tendency for some accusing parents or others involved in the case to accept this finding for civil purposes as well, and the alleged abuser will often feel a psychological boost from the criminal acquittal or the Crown's decision not to proceed with charges. Indeed, in some family law cases the judge has granted interim access to an alleged abuser, taking into account the fact that the police decided not to lay charges.[18] However, in light of the differences in these proceedings, it seems inappropriate for a family law judge to place much weight on the decision of the police not to lay charges or on a criminal court acquittal.

2.3 Family Law Proceedings

All federal and provincial family law legislation in Canada requires that custody and access disputes between parents be resolved on the basis of a judicial assessment of the "best interests" of the child. Only in Newfoundland does legislation specifically refer to violence as a factor in custody or access cases.[19] While abuse is not explicitly mentioned in most custody and access statutes, if an abuse allegation is made, this will generally become the central focus of the parents and the court. Testimony from various mental health professionals, social workers and assessors is often very important for these cases, though by no means determinative, and in the cases that are most likely to be litigated, professionals and experts may disagree about whether abuse occurred.

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[15] *S.S.* v. *P.S*, [1994] O.J. 995 (Prov. Ct.), Main J.

[16] *S.S.* v. *P.S*, [1994] O.J. 995 (Prov. Ct.), Main J.

[17] *M.R.P.* v. *P.P.* (1989), 19 R.F.L. (3d) 437 (N.S.Cty Ct.), new trial ordered when trial judge allowed unsupervised access to a father convicted of sexually abusing the children five years earlier and trial judge satisfied that father was rehabilitated and there was no risk to safety of children; the trial judge should have not only considered the issue of risk of further abuse but should have also required evidence that access was in the best interests of the children.

[18] *Stuart* v. *Stuart* (1985), 32 A.C.W.S. (2d) 53 (Ont.S.C.) per Cork M. In *Bartesko* v. *Bartesko* (1990), 31 R.F.L. (3d) 213 (B.C.C.A.), McEachern C.J.B.C. suggested that the fact that no charges were laid is "less than conclusive" but it "was at least a matter that the trial judge was entitled to comment upon" in deciding that the mother's sexual abuse allegations were "groundless" and awarding custody to the father.

2.3.1 Interim Access

One of the most pressing issues arising with any type of allegation of abuse is the need to decide whether contact between the alleged abuser and the child should be restricted. From the reported case law, it is apparent that when there is an allegation of abuse, especially sexual abuse, most judges will tend to "err on the side of caution" pending a full hearing.[20] Interim hearings are generally decided on the basis of affidavits from parents and any investigators or others who have been involved in the case. At this stage there is little opportunity for the accused parent to challenge the allegation, though there are a few reported cases in which judges have decided even at the interim stage that the evidence to support the allegation is so weak that unsupervised access may continue.[21] Judges are generally prepared to suspend unsupervised access at this stage if there are "real concerns" about abuse, without an actual finding on the civil standard of proof that abuse has occurred.[22] If a child protection agency is involved, the agency will often recommend the immediate suspension of access.[23]

In these cases, a court will generally only allow supervised access or, if this is not possible, will terminate access pending a trial. Frequently, the alleged abuser will be advised by a lawyer to consent to supervision of access on an interim basis, even if the allegation is unfounded. This will minimize the possibilities for further allegations being made, demonstrate appropriate concern for the child and avoid giving evidence that may be used to cross-examine him or her if charged criminally and he or she testifies.[24] While alleged abusers find access restrictions frustrating, especially in cases where the allegation is ultimately not proven, it is understandable that judges will not want to take a risk with the safety of a child. Counsel representing a person against whom an allegation is made will want to try to ensure that the most generous access is maintained pending trial, with whatever supervision can be arranged that is satisfactory to the court.

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[19] *The Children's Act* R.S.Nfld. 1990 c. C-8, section 31(3) specifies that the court shall consider the person's history of "violence" towards a spouse or any child when making a determination about whether that person shall have custody or access to a child.

[20] See e.g., *S.S.* v. *A.S.*, [1987] W.D.F.L. 897 (Ont.S.C.) per Cork M.; Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child?" (1994), 12 Can J.Fam.L. 91, at 100; and J. Wilson, "The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent" (1986), 1 Can. Fam. L.Q. 138, at 160.

[21] For examples of cases where the judge concluded at the interim stage that the allegation of sexual abuse was unfounded and allowed unsupervised access, see *Flanigan* v. *Murphy* (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork M.; and *B.J.A.B.* v. *K.J.R.* (1996), 21 R.F.L. (4th) 401 (Ont. Gen. Div.) per Aston J.

[22] See e.g., *G. (D.)* v. *Z. (G.D.)*(1997), 30 R.F.L.(4th) 458 (B.C.S.C.) per Power M.

[23] See e.g., *B.M.* v. *N.G.W.*, [1998] O.J. 297, 36 R.F.L. (4th) 249 (Ont. Gen. Div.); see also comments of L'Heureux-Dubé J. in *Young* v. *Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.).

[24] See e.g., *R.M.C.* v. *J.R.C.* (1995), 12 R.F.L. (4th) 440 (B.C.S.C.).

2.3.2 The Standard of Proof: Balance of Probabilities or Is a Real Risk Enough?

Canadian judges are not consistent in dealing with the problem of uncertainty in family law trials involving abuse allegations. Most judgements require that the person making the allegation prove to the court that it is more likely than not that the abuse occurred—the civil standard of proof on the balance of probabilities.[25] However, some cases focus on the issue of the "best interests" of the child and take account of situations where there are "serious concerns" about abuse, but the judge is unable to make a clear finding that abuse has occurred. Judges taking this approach may decide not to terminate all contact with an alleged abuser and may allow supervised access, or may decide to terminate access if the child appears to fear the alleged abuser, even if abuse is not proven.[26] In some cases, the judge concludes that even at this lower standard of proof there is insufficient evidence to conclude that there is a "real risk" to the child of abuse by the accused parent and allows unrestricted access.[27]

2.3.3 Founded Allegations

Generally, if a family law judge determines that the abuse allegation is founded, access by the abuser will be terminated, or at least closely supervised. However, in some cases a judge may allow unsupervised access even after making a finding that abuse occurred, if satisfied that the child will not be at risk in the future. Judges recognize that even children who have been abused may want to have some contact with the parent with a history of abusive conduct towards the child. Unsupervised access is most likely to occur if the parent has recognized that he has been abusive and sought treatment, and if the child is older and is likely to report any inappropriate behaviour.[28] In some cases, the abuser is a person who resided with or visits a parent, like a mother's boyfriend or an older stepchild, and the court may allow the parent to have access if satisfied that the perpetrator will not be in the house while the child visits.[29]

In some cases, the court will conclude that not all of the allegations of abuse were proven, but sufficient abuse was proven to terminate or curtail parental contact. In *E.H.* v. *T.G.* there was some expert testimony to support the mother's claim that the two children were subjected to physical and sexual abuse during access visits with the father. One of the children, then aged eight, testified that the father had not sexually abused the children and the trial judge allowed unsupervised access. The Nova Scotia Court of Appeal ruled that there was sufficient evidence of physical and emotional abuse during the visits that access should be terminated, even though the sexual abuse was not proven.[30]

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[25] See e.g., *M.T.* v. *J.T.*, [1993] O.J. 3379 (Prov. Div.). per Hatton Prov. J.; *H.* v. J. (1991), 34 R.F.L. (3d) 361 (Sask. Q.B.) Gagne J.; and *R.A.G.* v. *R.J.R.*, [1998] O.J. 1415 (Ont. Fam. Ct.) Robertson J.

[26] See *J.A.M.* v. *J.J.B.*, [1995] B.C.J. 1395 (Prov. Ct.) where Auxier J. was "unable to reach any definite conclusions" about the sexual abuse allegations, but felt that there was a "a substantial degree of risk that the child must be protected against" and terminated access. See also *E.S.* v. *D.M.*, (1996), 143 Nfld. & P.E.I.R. 192 (Nfld. U.F.C.) where Puddester J. held that there was a "substantial possibility that it [sexual abuse] may have occurred" and ordered supervised access.

[27] See e.g., *M. (P.A.)* v. *M.(A.P.)*, [1991] B.C.J. 3020 (S.C.) per Errico J.

[28] See e.g., *F.(E.)* v. *S.(J.S.)*(1995), 17 R.F.L.(4th) 283(Alta C.A.).; and Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child" (1994), 12 Can. J.Fam. L.91, 108-113.

[29] *C.H.M.* v. *K.W.*, [1983] O.J. 744 (Prov. Ct. Fam. Div.).

2.4 Supervised Access when Child Abuse is Alleged

While an investigation into allegations of child abuse is ongoing, there are several options available regarding access to the child by an accused parent. Depending on the assessment of risk to the child, if the accused parent has custody of the child, then the child protection authorities may apprehend the child. If the accused parent does not have custody of the child, a court acting under child welfare legislation, family law legislation, or even the *Criminal Code*, may deny access or require supervised access, though in some cases there may be no restrictions placed on access (A detailed discussion of how to assess the validity of allegations of child abuse made in the context of parental separation is beyond the scope of this report. However, there is considerable literature on the topic, and interested readers are directed to the selected bibliography contained in Appendix B).

It is generally recognized that when parents separate, children seem to fare better if they have contact with both parents in an atmosphere of co-operation (Wallerstein & Kelly, 1980; Maccoby & Mnookin, 1992). But when an abuse allegation is made, the safety of the child is usually a paramount concern. Supervised access is one strategy for maintaining contact between an accused parent and a child while ensuring protection of the child from physical or sexual abuse.

A person such as a child welfare worker, a volunteer or a relative can provide supervision, or it can be provided through a program operated by a social service agency or visitation centre. A variety of services can be offered by a centre or program, including:

- supervised exchange (pick up and drop off services);
- on-site supervised visitation (individual or group monitoring);
- supervised visitation off-site (e.g., at the home of relative or foster parent);
- monitoring through mirrors or cameras;
- court assessments that range from factual reports on whether visitation occurred and any problems encountered, to recommendations regarding visitation; and
- therapeutic interventions.

2.4.1 Supervised Visitation Programs

Visitation centres and programs protect children from violence and abduction, while providing abusive parents access to their children in an environment that encourages positive parenting. Supervised visitation programs can also have an important role in allowing continued contact between a parent and child while an abuse investigation is underway. The programs can also serve an important function in cases where there is high parental conflict but no issue of child abuse.

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[30] (1995), 18 R.F.L. (4th) 21 (N.S.C.A.).

Other countries have recognized that supervised visitation centres are an important and necessary resource for protecting children from violence. These centres are typically involved in cases where parents are litigating against one another, and in some jurisdictions may also be involved in child protection cases where the agency has removed the child from parental care. Information from the United States and Canada, Australia, and England and Wales is presented below.

United States and Canada

A large study of supervised visitation services by Pearson and Thoennes (1998) provides a picture of the current supervised visitation services available in North America, the perceived need for the services, and the issues facing service providers. Information was collected from 94 programs in the United States and Canada, 51 family court administrators and judges, 40 administrators of child protective service agencies, as well as from in-depth interviews with program professionals in five selected communities in the United States.

The researchers concluded that supervised visitation programs fill an important need. Child protection professionals recognize the benefits of parent-child contact, and judges often feel that supervised visitation is the only responsible response. However, available resources do not match this need. The child protection administrators surveyed stated that most visitation supervision is provided by its agency caseworkers (69 percent), 85 percent of whom said they lack the time to supervise visits as ordered by the courts. The agency administrators also expressed a need for supervised visitation in non-office settings and during non-working hours, such as evenings and weekends.

The judges surveyed said there is a need for more supervised visitation resources. While almost one-third (30 percent) said they use family and friends as supervisors, three-quarters of them expressed scepticism about doing so. The judges estimated that they ordered supervised visitation in less than five percent of the divorce filings in their jurisdiction, but 60 percent felt that the services were required in at least twice as many cases.

According to Pearson and Thoennes (1998), 67 percent of the visitation program administrators surveyed cited lack of funding as a major problem, particularly for programs that handle family law parental custody and access cases. While user fees comprise the single largest source of funding, they only account for 31 percent of the program budget. Approximately one-half (51 percent) of the programs surveyed provide supervision for both child protective services cases and divorcing families with visitation disputes; one-third (33 percent) serve only divorcing and separating families and 16 percent serve only child protection cases.

An average case will receive supervised visitation services for approximately nine to ten months, with an average of 4.3 visits per month of approximately two hours duration. Visits typically occur in a one-on-one setting at the visitation facility. Most programs use volunteers to help supervise visits, and cases are received almost exclusively through referrals by the courts. Program administrators voiced concerns about lack of funding and space.

Pearson and Thoennes (1998) found disagreement among their survey respondents regarding the role that visitation supervisors should play in assessment and treatment. Most judges and court administrators (86 percent) indicated that it was "very important" or "somewhat important" that the supervisor advise the court on the validity of the allegations that led to the referral in order to assist the court in determining suitable custody and visitation arrangements. Visitation supervisors also said they would like to play a more active role by providing feedback about the families to the court (80 percent) and modelling positive parenting behaviour (60 percent). Program directors expressed the following concerns about visitation supervisors taking a role in advising the court about the validity of abuse allegations, or custody and access in general:

(1) whether supervisors are qualified to make recommendations about custody or visitation to the courts;

(2) fear that they would lose their perceived neutrality and thereby reduce their ability to deal effectively with both parents; and

(3) issues regarding liability.

The authors concluded that:

> Supervised visitation programs assist the family court and child protective service agencies with a small but extremely needy population. In the absence of such programs, parent-child contact would either not occur or would occur in more questionable settings...Supervised visitation programs, however, work best when they complement other therapeutic interventions. Many of the families served have serious dysfunctions that are not addressed by simply visiting in a safe environment. They want and need sophisticated assessments and treatments by trained personnel that address the allegations that brought the family to the program. Typically, they lack the financial resources to purchase costly assessments and treatments (Pearson & Thoennes, 1998: 21).

There is no literature assessing Canadian facilities (other than the Pearson and Thoennes [1998] study), and that study does not distinguish between Canadian and American facilities. However, it would seem that in Canada, supervised access programs are less likely to deal with child protection cases and more likely to deal exclusively with family law cases.

Australia

In Australia, children's "contact services" are operated by non-profit or community-based organizations that provide changeover transport, changeover supervision on or off site, and/or supervision of a contact visit on or off site. The Attorney General's Department of Australia established ten contact services throughout the country in 1996/1997, and a two-year comprehensive research and evaluation project is currently being conducted on the contact services in Australia (Strategic Partners Pty Ltd., 1998). Findings from the *Year One Report* are very positive. They indicate that there was considerable consistency in the provision of service, as well as the underlying philosophy. Legal Aid and Family Services provided most of the funding for the services (ninety five percent); client fees and other non-government contributions provided the remainder. The majority of workers are in casual positions (seventy four percent), and half of the co-ordinators work part-time. Staff qualifications and experience varied considerably. From January to June 1997, the services supervised 1,567 visits and 3,241 changeovers. Seventy percent of referrals were from the legal system (forty percent from solicitors, twenty-two percent from Family Court, and eight percent from community legal centres). The main reasons for referral were:

- fear of domestic violence between parents;
- fear of abuse of the children or fear of abduction;
- lack of parenting skills; and
- lack of contact between parent and child.

A survey of clients found that "parents were basically satisfied with the quality of the service, although...many parents would prefer not to use the service and there was resentment of the Family Court in this regard" (Strategic Partners Pty Ltd., 1998). Parents requested more information and support and suggested that the service could provide more support in assisting them as parents and/or in communicating with the other parent. Many parents expressed concern about the lack of flexibility in hours and the inadequacy of the physical environment and resources.

The Honourable Justice Nahum Mushin of the Family Court of Australia, speaking at an International Conference on Child Access Services in October 1998, stated: "The setting up of contact centres in Australia has been a very positive event. The Court is delighted with the announcement of the Australian Government that it has decided to apply a further $16 million to setting up a further 25 supervised contact centres throughout urban and regional Australia" (Mushin, 1998).

Non-government funded contact services also exist in Australia, although without government support they have great difficulty in continuing to operate. A survey of non-government funded contact services in Australia found that the basic requirements for viability of the centres are:

> ...strong community involvement, support from a legal centre or social service, free use of accommodation, a fee for service for supervised access and a nominal charge per parent for changeover, good marketing of the product, certain size of population (around 75,000 minimum), ability to offer transport, and very importantly, a tertiary trained coordinator with a high visibility in the community (Renouf, 1998: 3).

England and Wales

According to Furniss (1998), there is a presumption by the judiciary in England and Wales that children should have contact with non-residential parents unless there are cogent reasons to deny "contact" (as access is called). In 1996, over 35,000 contact orders were made by the courts. To help families deal with problems over contact, two types of services have been established:

(1) family mediation services, to assist parents to reach mutually acceptable decisions regarding the upbringing of their children; and

(2) family contact centres, to provide a safe, neutral place for contact between children and non-residential parents.

Family contact centres were first established in the United Kingdom in the 1980s, but 40 percent of the over 250 centres now existing have been established since 1995 (Furniss, 1998). Centres are established through co-ordinated efforts between professionals who work with children and families (such as court welfare officers, magistrates and judges, solicitors, and social workers) and the voluntary sector. Professionals recognize the need for the service, encourage the establishment of the service, and then refer families to it once it is open. The majority of centres are open only on the weekends, and contact takes place in a common room with other families. Most centres also provide handover or supervised exchange services. There is usually one staff member (or a volunteer) for every two to three families. There are also centres in the UK that are run exclusively by paid professionals. These centres offer a range of services to families—such as intensive supervision; court assessments; therapy and counselling; parenting skills education; mediation—and are more expensive to run.

Each centre supervises approximately 50 families per year (or 80 children), which means that over 20,000 children attend a contact centre each year in the United Kingdom (Furniss, 1998). Debates have now begun over the need for centre evaluations, increased formalization, and better training and qualifications for staff versus increased supervision for voluntary organizations. Concerns are that imposed criteria would stifle voluntary organizations and innovative projects, localized needs would be ignored, and the neutral nature of the service would be affected. Furniss (1998: 3) concludes that:

> ...clear communication and understanding about what each centre can (and cannot) provide is essential. Relationships between centres, the courts and others working with families need to be thought out and policies developed and adhered to. These should range from risk assessment (which is more properly the responsibility of professionals working with the families than untrained volunteers), through review and also covering reporting and confidentiality. If everyone has a clear idea of the services on offer, then the diversity of the services provided by different contact centres in England and Wales can be put to best use, for the benefit of the many families who use those centres.

3.0 OFFENCES FOR FALSE ALLEGATIONS OF ABUSE AND LIABILITY ISSUES

3.1 Offences for False Allegations of Abuse

In theory, a person who knowingly makes a false allegation of sexual abuse may be committing a number of offences under the *Criminal Code*. A person who knowingly makes a false statement to a police officer accusing another person of committing a crime (which would include any situation of child abuse) commits the offence of mischief, contrary to section 140 of the Code. If the false allegation resulted in a civil or criminal proceeding in which the person who made the allegation testified, other offences might be committed, including perjury (giving false evidence under oath, section 131) or making a false affidavit (section 138). If the accuser persuaded or misled the child or another person to make a false statement, this would be the offence of obstruction of justice (section 139). However, given the criminal standard of proof and the difficulty of proving that the person who made the statement knew it was false, there are very few charges laid under any of these sections in any context.

The difficulty with laying any of these charges is that a prosecution will only succeed if it can be proven beyond a reasonable doubt that the statement was false and that the person making the statement knew it was false. The maker of a false report has a defence if they have an "honest belief" in the allegation when it was made, even if the belief was not reasonable. It may be that the accuser would be found liable if it can be proven that he or she was "wilfully blind" to the falsity of the statement when it was made.[31]

We were able to locate only one reported Canadian case since 1990 in which the maker of a false allegation in the context of parental separation was charged with any of these offences. In *A.N.* v. *A.R.*[32] the parents were never married and separated shortly after the child was born. The mother initially had *de facto* custody and began to make allegations that the father was sexually abusing the child. The allegations became increasingly serious. At first the father was denied access, though he later obtained interim supervised access, and eventually obtained custody. He only obtained custody after the police and Children's Aid Society investigated thoroughly, and four mental health professionals conducted assessments. These professionals all concluded that the allegations were unfounded, and a result of the mother's "irrational fixation" on sexual abuse and her "delusional thinking." As a result of persisting in making these allegations, the mother was charged with public mischief and convicted. Nevertheless, she continued to maintain that the allegations were true and raised the issue of abuse at the custody trial. The judge observed that the child's emotional health improved since he had ceased living with his delusional mother, and awarded custody to the father with supervised access to the mother. The judge warned the mother that if she continued with her "delusional thinking," access would become harmful to the child and would be terminated.

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[31] *R.* v. *Sansregret*, [1985] 1 S.C.R. 570.

[32] [1995] O.J. 3420 (Prov. Ct.) Magda Prov. J.

There are a few reported Canadian cases which involved female teenagers who made false allegations of sexual abuse in an extra-familial context and were charged with mischief.[33] It would appear that the girls later recanted and admitted that they knew that the allegations were false, and the prosecution was based on their own admissions that the allegations were false.[34] Without these confessions, these cases would have been very difficult to prosecute.

3.1.1 Finding of Contempt of Court Against Person Making False Allegation

While there is only one reported case in Canada of a person making a false allegation of abuse in the context of parental separation being criminally charged, there are a few (four out of one hundred and ninety-six) reported cases in which the person making false allegations has been found to be in contempt of court as part of the civil process and subject to sanctions including fines or jail. These cases all involved a custodial parent with a vengeful attitude or irrational fears refusing to obey an access order. Typically, before the court imposed a sanction, the custodial parent was warned at several court appearances that a finding of contempt would be forthcoming if access continued to be denied.

A case law review suggests that contempt sanctions are imposed only when police or other professionals have thoroughly investigated and found the allegations without substance. For example, in the 1998 Ontario case of *L.B.* v. *R.D.*,[35] the custodial mother persistently made allegations that the father sexually abused their daughter and that his new wife was physically abusive to the child. The Children's Aid Society investigated and could find no evidence to support the allegations, but supervised access was ordered. The mother repeatedly interfered with supervised access visits; the mother's testimony about the reasons for failure to allow supervised access was refuted by the access supervisors, who were professionals, as well as by the Office of the Children's Lawyer. There were several attempts to enforce access, involving both the police and court appearances. Ultimately, Judge Dunn decided to impose a sentence of 60 days in jail for civil contempt, finding that there were at least forty occasions on which the mother deliberately failed to comply with the access order. An appeal judge reduced the sentence to the time served, 9 days.

The use of civil contempt proceedings to enforce access can be a cumbersome and expensive process and judges usually make findings of contempt and impose sanctions like jail as a last resort.

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[33] *R.* v. *L.M.L.*, [1996] O.J. 856 (Prov. Ct.); (female teenager pled guilty to making a false allegation against an elderly man and received a probationary sentence); *R.* v. *J.J.* (1988), 43 C.R. (3d) 257 (Ont. C.A.) (female teenager made false report of sexual abuse against her brother; it would appear from the judgement that she later admitted that the statement was false).

[34] *L.G.* v. *C.M.P.*, [1998] B.C.J. 2052 (S.C.) illustrates some of the complexities in this area. When she was a teenaged girl, L.G. disclosed that her father was engaged in an incestuous relationship with her. A short time later she recanted, and was charged with and convicted of obstruction of justice, and placed on probation. She later had a child with the father. Despite the conviction for mischief, her original reported abuse was undoubtedly true; it was the recantation that was false. All of this came to light much later when the woman began to accuse her mother and stepfather of sexually abusing the child who was born of the incestuous relationship with her father. In a custody trial the judge awarded custody to the grandmother, finding the sexual abuse allegations against the grandmother to be without foundation, but suggesting that they were made as a result of the "mental instability" of the mother, which was a result of the incestuous relationship with her father.

[35] See e.g., *L.B.* v. *R.D.*, [1998] O.J. 858 (Prov. Ct.), varied [1998] O.J. 2900 (Gen Div.).

3.2 Liability Issues

3.2.1 Child Protection Agency Liability to the Wrongfully Accused Parent

There have been a number of highly publicized cases in Canada in which individuals have claimed that they have been wrongfully accused of sexual abuse by "overzealous" investigators, and have sought redress in the courts. In most cases, these individuals have been satisfied with an acquittal in criminal court, or a finding in a civil proceeding that refutes the abuse allegation. However, in a few cases individuals have sued investigators for monetary damages to compensate for the expense and emotional anguish from being wrongfully alleged to have abused their child.

Perhaps the most noteworthy case[36] of agency incompetence and bad faith began in 1987 when a Children's Aid Society in Ontario supported allegations of sexual abuse made by a mother against her former husband. The initial allegation of abuse arose in the context of parental separation and related to the couple's young children. The agency worker with primary responsibility for the investigation was inexperienced, and the judge in the later civil case brought by the former husband concluded that the investigation and subsequent agency conduct were negligent in several critical respects.

Shortly after the initial report from the mother was received, and without interviewing the father, the worker quickly concluded that the mother's sexual abuse allegations were well-founded. The worker's initial interview with the children had many leading questions, and was conducted in the presence of the mother, who was clearly hostile to the father. The worker later displayed hostility towards the father and his lawyer, and dismissed any concerns about the mother without investigation. Indeed, reports by the children of ill treatment by the mother and the worker's direct observation of poor treatment of the children by the mother were ignored by the worker. The father was not adequately interviewed for his version of the alleged incidents until two years after the initial allegations. The worker kept very poor notes of the various interviews and none were audio or video recorded.

As the child protection trial proceeded in Family Court, it became apparent that the agency's allegations were groundless, but the agency refused to discontinue the protection application unless the father agreed to forego any claim for court costs. The child protection trial eventually took 51 days to complete. The judge in the protection hearing dismissed the agency allegations against the father, awarded him custody of the children, and ordered the agency to pay $60,000 towards the father's legal fees.

The father then began a civil suit against the agency and the child protection worker to recover the balance of his legal and other expenses incurred in his lengthy battle to regain his reputation and custody of his children, as well as punitive damages. In 1994 in *D.B.* v. *C.A.S. of Durham Region*, Justice Somers of the General Division of the Ontario Court of Justice awarded the father over $110,000 in damages resulting from the false allegation of sexual abuse.[37] The judge in the civil suit concluded that the agency and worker had been negligent and unprofessional in their treatment of the father, negatively affecting both the father and his children. The judge found that the father, an Anglican minister, suffered emotional trauma and loss of reputation as a result of the child protection proceedings and awarded $35,000 in damages for this, and an additional $10,000 for exemplary damages to punish the "bureaucracy's" incompetence and abusive actions. The court also awarded a total of $1,500 to the two children for their emotional harm and loss of enjoyment of their relationship with their father. The trial judge also awarded the father $77,000 to cover legal, travel and telephone costs not previously paid as a result of the Family Court proceeding, though the Ontario Court of Appeal reduced that part of the award by $25,000, ruling that the issue of recovery of legal expenses was fully resolved in the earlier Family Court proceedings. While the Ontario Court of Appeal reduced the damage award, it affirmed the principle that an agency could be liable if it was both negligent and biased in its investigation.

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[36] This case is referred to in the Report of the Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (1998), p 85.

[37] *D.B.* v. *C.A.S. of Durham Region*, [1994] O.J. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.).

The decision in *D.B.* v. *C.A.S. of Durham Region* may seem burdensome for a public agency with an obligation to investigate all reports of abuse[38] despite limited financial resources. However, the Court of Appeal emphasized that there was not merely negligence, but actually a demonstration of bias sufficient to conclude that the agency staff was not acting in "good faith." Not only did the agency carry out an inadequate and biased investigation, it continued a lengthy child protection proceeding only because the father pressed a legitimate claim for payment of his legal costs in the protection hearing. The decision emphasizes the need for child protection agencies and their workers to conduct fair investigations, and treat fairly those alleged to have abused children.

While *D.B.* is a very disturbing case, it is the only reported case in Canada where a child protection agency has been found liable to a falsely accused parent. In other cases where an agency has been found to have supported an unfounded allegation of parental abuse and been sued for alleged incompetence in investigating abuse allegations, the courts have dismissed the claims, generally by finding that the agencies were acting in "good faith" and hence entitled to statutory immunity from civil suits for "mere" negligence, or the cases are still before the courts.[39]

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[38] In England, courts have ruled that as a matter of public policy such suits against a child protection agency should not be permitted. *M.* v. *Newham Borough Council*, [1994] 2 W.L.R. 554 (Eng. C.A.).

[39] Some cases are still ongoing; see *D.W.* v. *D.W.*,[1998] O.J. 2927 (Gen. Div.); and *Y.C.* v. *Children's Aid Society of Metro Toronto* (1998), 37 R.F.L. (4th) 381 (Ont. Gen. Div.). In 1991 in *A.G.* v. *Supt. of Fam. & Child Service for B.C.* (1991), 21 R.F.L. (3d) 425, 61 D.L.R. (4th) 136 (B.C.C.A.) the British Columbia Court of Appeal barred a civil suit against the provincial child protection authorities and its social workers brought by parents wrongfully alleged to have sexually abused their children. While the Court found that the social workers made "errors of judgment," for example by not communicating with the family doctor and school counsellor at the time the children were apprehended and failing to interview the parents and children thoroughly, the Court accepted that the workers were acting in "good faith." The Court accordingly relied on British Columbia legislation to dismiss the parents' action, ruling that "mere negligence" was not sufficient basis for such a law suit.

3.2.2 Civil Liability of Professionals and Parents for False Allegations in Abuse Cases

In addition to the issue of child protection agency liability, there are also cases of professional incompetence in situations where allegations of abuse are made, and there is at least the potential for independent professionals involved to be held accountable for their incompetence.[40] In general, professionals are not liable for "mere errors of judgment" and in some situations will only be liable if they have acted in a biased fashion.

In a number of difficult cases, the parents have become so emotionally enmeshed and convinced of their position that they blame alleged professional incompetence if their position is not vindicated in court. The professionals may then find themselves involved in expensive but groundless discipline or malpractice proceedings. Acrimonious custody or access disputes are frequently the source of complaints of professional incompetence to various disciplinary bodies as well as in the courts.

There is a significant degree of civil immunity for alleged negligence arising out of testifying in court about allegations of abuse. This is the concept known as "privilege." In the British Columbia case of *Carnahan* v. *Coates*,[41] a psychologist who worked for the clinic that was treating the mother was retained by the mother to provide an opinion that supported her application to terminate visits with the father. Although the psychologist did not interview the father, he concluded that the children had considerable anxiety about their visits with the father, and that their negative attitudes were their own views, rather than merely a reflection of the mother's concerns. Supported by the testimony of the psychologist, the court terminated the father's access, though after four years the father was able to persuade the courts to reverse the decision and gain a legal right to access, supported by an independent expert who concluded that the "children's wishes were a mirror reflection of their mother's destructive manipulation."

Tragically, by that time it was too late for the father to establish a meaningful relationship with the children, and he "conceded defeat" and ceased trying to enforce access. In the meantime, the father complained to the British Columbia Psychological Association, which censured the first psychologist for "unethical and unprofessional conduct" in the course of preparing his assessment, including failing to adequately interview the children to ascertain the true reasons for their expressed preferences. The father then sued the psychologist for negligence and abuse of process that resulted in him losing his relationship with his children. The court rejected the civil claim as the psychologist had a "qualified privilege" that gave him immunity from civil suit for the opinions he expressed in court, even if he was negligent in formulating them. The judge did, however, recognize that the grant of privilege was not "absolute" and a witness could be liable if it was proved that there was a "conspiracy" to put forward false testimony.

A 1996 Saskatchewan decision, in *R.G.* v. *Christison*,[42] illustrates that professionals who are negligent may, in some extreme situations, be liable for their out-of-court statements, especially if they have lost professional objectivity and become "allied with" a parent. In this case, the former spouses were involved in an acrimonious custody dispute. The mother made repeated allegations of sexual abuse against the father and his new wife (both of whom were physicians). Child protection authorities and the police investigated the mother's allegations, and found them to be baseless. The mother's counsellor continued to support her in the claims of child abuse, though other experts and assessors rejected them. Even after the child protection authorities, the police and the court rejected the abuse allegations, the mother told various professionals, including teachers of the children, about her allegations. She also distributed a supporting report from her counsellor, without telling the recipients that the claims had been investigated by the appropriate authorities and rejected.

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[40] In *D.B.* v. *C.A.S. of Durham Region*, discussed above, both the agency and its workers were found civilly liable. There are no reported civil cases that distinguish between the liability of the agency and its employees.

[41] (1990), 27 R.F.L. (3d) 366 (B.C.S.C.) Huddart J.

[42] (1996), 150 Sask. R. 1, 31 C.C.L.T. (2d) 263, 25 R.F.L. (4th) 51 (Sask. Q.B.), varied with respect to costs (1997), 153 Sask. R. 311 (Q.B.).

The father and his new wife sued the mother and her counsellor for defamation and infliction of mental suffering. The court ruled that the distribution of the report to members of the community was not protected by privilege. The judge accepted that a parent has a "qualified privilege" arising out of child abuse reporting laws that allows the sharing of "good faith" but inaccurate information about possible child abuse with professionals who work with the children.[43] However, the court found that the mother was motivated by "malice" since when she distributed the reports she knew that they had been investigated and found baseless. The judge was critical of the counsellor, noting that she "must be, or *should be*, aware that in the heat of custody battles [unfounded] charges of emotional, physical and sexual abuse are made with increasing frequency." The court was also critical of how the counsellor assessed the case, and how she wrote her report and identified completely with one parent. The mother and counsellor were held jointly liable for $27,000 for defamation (loss of reputation) and various expenses incurred by the plaintiffs. The counsellor was held solely liable for $15,000 in aggravated damages. The court still had some sympathy for the position of the mother, and did not want to bankrupt her since she had joint legal custody and liberal access to the children. Thus, the mother was held solely liable for only $1,000 in aggravated damages.

Lawyers and judges are not immune to being accused of incompetence or bias as a result of their involvement in this type of highly charged case. For example, in one Ontario case, a father involved in bitter and protracted matrimonial litigation including allegations of sexual abuse argued that the reason he was largely unsuccessful at trial was due to his lawyer's incompetence and the judge's error. In resolving the dispute over legal fees, the judicial assessment officer rejected the claim of professional incompetence, finding that the client was "not credible" and was a "very difficult" client who "refused to follow the directions" of his lawyers or give them proper instructions.[44] The client was unsuccessful in appealing both the judge's decision on the merits of his case and the assessment officer's finding that the trial lawyer was not incompetent.

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[43] In *Wood* v. *Kennedy* (1998), 165 D.L.R.(4th) 542 (Ont. Gen. Div.) a 13-year-old girl alleged that her uncle sexually assaulted her on several occasions during family visits. The uncle was criminally charged, though the charges were dropped the day of trial. The uncle sued the girl and her parents. The civil suit against the parents was dismissed, as they honestly believed and understandably supported their daughter. The girl, however, was found to have deliberately lied about the abuse (apparently because of emotional problems related to her parents' separation and her father's alcoholism). She was found liable for malicious prosecution, with damages to the uncle for $25,000 for his legal fees in the criminal case, $20,000 in general damages, $5,000 to the uncle's wife, and $1,000 to each of the uncle's three children. This judgment may be effectively impossible to enforce against the teenaged girl.

[44] *Borden & Elliot* v. *Neuberger,* [1992] O.J. 1797, affd. [1997] O.J. 1797(C.A.). See also [1990] O.J. 1624 (Div. Ct.), [1991] O.J. 753, [1994] O.J. 3612, [1996] O.J. 4746.

The client also ended up in disputes with other lawyers he retained in this case to handle various appeals over the terms of supervised access and other matters.

It is not uncommon for unsuccessful litigants in these cases to not merely appeal the finding of the trial judge on the basis of judicial error, but to make complaints to the media or to the Canadian Judicial Council about bias. In one Alberta case, the grandparents of children whose parents had died and who had access rights to the children sought to gain custody, making repeated allegations of abuse. The allegations were investigated by police and social workers and were rejected by the courts on a number of occasions. The grandparents were unsuccessful in appealing their case to the Supreme Court of Canada, but continued to complain about a "conspiracy" involving lawyers, police, social workers and all of the judges who dismissed their allegations. The grandparents publicized their complaints about this "conspiracy" to the media and through a campaign of letter writing and pamphlet distribution.[45]

Although there are undoubtedly a few incompetent professionals involved in cases of allegations of abuse after parents separate, it is also apparent that at least some of the parents involved in these cases are emotionally unbalanced, either before the process starts or as they litigate through the legal system, and are all too willing to blame others for their own failings. This understandably makes some professionals wary of being involved in this type of case.

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[45] *A.H.T* v. *E.P.*, [1997] A.J. 739 (Q.B.).

4.0 NATURE AND SCOPE OF ALLEGATIONS OF CHILD ABUSE IN CUSTODY AND ACCESS DISPUTES

Strong concerns were raised during the public hearings of the Special Joint Committee on Child Custody and Access about deliberately false allegations being a substantial and growing problem. Some witnesses suggested that false allegations are being used as a tactical weapon by a large number of family law litigants and warned that it was becoming a practice condoned and sometimes even encouraged by some women's shelters, child welfare workers, and lawyers. This chapter examines more closely the issue of false allegations of abuse in the context of parental separation. It includes a summary of the research literature in this area; relevant findings from the Ontario Incidence Study (OIS) of Reported Child Abuse and Neglect, and also a review of Canadian case law. It should be emphasized that, as noted in Section 1.0, it is important to distinguish between intentionally false allegations and other types of unfounded or undetermined allegations.

The information in this chapter is particularly relevant to question 2 in Section 1.0: what are the nature and extent of allegations of child abuse in the context of custody and access disputes?

4.1 Review of Current Research

Child abuse, particularly child sexual abuse, was identified by child protection workers and mental health professionals as a serious problem by the mid-1970s. Professional and public awareness of the problem increased as the federal government sponsored various initiatives designed to address the problem (Hornick & Paetsch, 1995). In the mid-1980s, however, newspapers in Canada and the United States began to publish reports claiming that mothers were falsely accusing fathers of child abuse during custody disputes (Bonokoski, 1986; Jones, 1986; Dullea, 1987; Zweig, 1987). Influential writings by Gardner (1987), Green (1986), and Benedek and Schetky (1985) argued that false allegations of abuse in the context of parental separation are a serious, widespread problem. The limited research on the extent of false allegations of child abuse is summarized in Table 1 and discussed below.

Gardner (1987), an American child psychiatrist, claimed that the vast majority of children who said they had been sexually abused by a parent following separation were brainwashed and programmed by their vindictive and hostile former spouses, usually mothers. He coined the term "Parental Alienation Syndrome" to describe the situation where a child demonstrates a strong affinity for one parent and alienation from the other, usually in the context of divorce. However, in a review of Gardner's work and the Parental Alienation Syndrome, Faller (1998: 112) stated that "no data are provided by Gardner to support the existence of the syndrome and its proposed dynamics. In fact, the research and clinical writing of other professionals lead to a conclusion that some of its tenets are wrong and that other tenets represent a minority view."

Table 1: Summary of Research Findings on the Extent of False Allegations of Child Abuse*

Authors	Year	Country	Sample	Rate of "False Allegations"	Definition of "False Allegation"
Benedek & Schetky	1985	United States	18 custody cases	55% (10 cases)	Intentionally and unintentionally false, and seven cases where accuser had psychiatric disorder.
Green	1986	United States	11 cases of alleged sexual abuse in custody and access disputes	36% (4 cases)	Refers to unintentionally false or unsubstantiated.
Jones & McGraw	1987	United States	576 reported cases of child sexual abuse	6%	"Fictitious" reports—cases where professionals did not consider that abuse had occurred (including parents with psychiatric disturbances).
Hlady & Gunter	1990	Canada (British Columbia)	370 children referred to child protection service; 41 also involved in custody disputes	Rate not given	Authors conclude that while the issue of false allegations of sexual abuse is a prevalent concern in custody/access cases, it is not reflected in their research.
Thoennes & Tjaden	1990	United States	Court files of more than 9,000 families in custody or access disputes; 169 involved allegations of sexual abuse	Less than 1% of total; 33% of 169 abuse cases unfounded, 17% no documentation	False allegations not looked at specifically—rates refer to cases that were not believed to involve abuse.
Anthony & Watkeys	1991	United Kingdom	350 cases of reported child sexual abuse; 24 involved in custody disputes	8.5% of total	False and malicious.
Trocmé, McPhee, Tam & Hay	1994	Canada (Ontario)	2,447 investigations, of which 9% are cross-custody allegations	1.3% of allegations by mothers and 21.3% of allegations by fathers	Determined by child welfare investigators to be intentionally false.
Faller & DeVoe	1995	United States	Clinical sample of 215 cases of allegations of sexual abuse in families also involved in divorce	20.9% possibly or actually false	Misinterpretations by the adults making the report.
				4.7%	Determined to be intentionally false by clinical assessment.
Brown, Frederico, Hewitt & Sheehan	1998	Australia	200 child abuse allegations in custody and access disputes	9%	Allegations that were investigated by child protection services and found to be false as opposed to allegations that were investigated but not substantiated.

* Please note that the studies included in this table are not necessarily incidence studies designed to measure the extent of false allegations. Also, note that the studies use different definitions of "false allegations," making comparisons difficult.

American researchers, Benedek and Schetky (1985), reported that their assessment of 18 custody cases with sexual abuse allegations found that 10 were false, resulting in a false allegation rate of 55 percent. In all 18 cases the accusations were made by mothers, mainly against fathers (n=16), with one report against a stepfather, and one against a boyfriend. The authors claimed that of the mothers making the false accusations, seven had psychiatric disorders including paranoia, hysteria, and schizophrenia. This study has also been criticized for its small and possibly biased sample (Faller, 1998; Thoennes & Tjaden, 1990).

An American psychologist (Green 1986), claimed that there are more false allegations of sexual abuse during court litigation involving custody or visitation than in other contexts, basing his assertions on his own documentation of false allegations involving 4 of 11 children reported to be sexually abused by the non-custodial parent in custody and visitation disputes. He hypothesized that false disclosures by children occur in the following situations:

(1) the child is brainwashed by a vindictive parent, usually the mother, who alleges the abuse to stop access to the child;

(2) the child is influenced by a delusional mother who is projecting her own unconscious sexual fantasies onto her spouse;

(3) the child's allegations are based on his or her own sexual fantasies rather than reality; and

(4) the child is falsely accusing the father for revenge or retaliation.

Green's claims are challenged by Corwin, et al. (1987), who argue that Green used a biased sample, an inadequate database, and unsupported conclusions. These authors also claim that one of Green's four "false allegation" cases was misdiagnosed by him, and was actually a valid abuse allegation.

It should be noted that the studies by Benedek and Schetky as well as by Green are based on highly contested cases being assessed for trial. More recent and comprehensive studies (discussed below) of all cases where abuse allegations are made in the context of parental separation indicate lower rates of unfounded and deliberately false allegations. It is likely that studies with family law litigation-based samples have higher rates of unfounded and false allegations than studies based on all cases involving parental separation that are referred to child protection investigators; cases where the allegation is investigated by child protection workers and believed to be founded are less likely to be litigated in the family law context.

4.1.1 Extent of the Problem

There is a lack of incidence studies on the extent of false allegations of child abuse, and what little information we have is primarily from other countries. Further, it is important to note that the studies described below use different definitions of false allegations, making comparisons difficult. In the largest study to date, Thoennes and Tjaden (1990) collected data over a six-month period from eight courts in different American cities. Of the over 9,000 families involved in custody or visitation disputes, only 169 cases (1.9 percent) also involved an allegation of sexual abuse. Further assessment of 129 cases (of the 169 above) that could be evaluated by child protection service and court workers[46] resulted in the following classification of cases:

- 50 percent were believed to involve abuse;
- 33 percent were not believed to involve abuse; and
- in 17 percent, no determination could be made.

While the authors do not provide a breakdown of the 33 percent of the cases that were not believed to involve abuse, they do state that "we also found no evidence to support the belief that these cases typically involved mothers falsely accusing fathers to gain or maintain custody of the children" (Thoennes and Tjaden, 1990: 161). Indeed, Pearson (1993: 279) concludes from this study that the contention "that there is a rising tide of false sexual abuse allegations in divorce cases in an effort to gain some custody advantage" is a myth.

Interestingly, Thoennes and Tjaden (1990) also found that the substantiation rate was the same (50 percent) for all cases of allegations of child sexual abuse, regardless of whether there was a custody or access dispute. This is contrary to findings of a study by Haskett et al. (1995) which indicated that allegations were much less likely to be substantiated if there was a custody dispute. Haskett and her colleagues analyzed 175 cases of alleged child sexual abuse from seven counties in Florida and North Carolina, of which eight percent (n=14) involved a custody dispute. While the authors determined that sixty-seven percent of the total sample of allegations were substantiated, only fourteen percent of the cases that involved a custody dispute were substantiated. The authors acknowledged potential bias in their sample, however, and stated that despite published guidelines that recommend extended assessments for investigating such allegations involving custody disputes, they found that child protection service workers were no more likely to interview alleged offenders in custody disputes than in other cases.

Faller and DeVoe (1995) examined a clinical sample of 215 cases of allegations of sexual abuse in families also involved in divorce. The cases were drawn from a university-based clinic in the American Midwest over a 15-year period. The clinic conducts multidisciplinary evaluations to determine whether sexual abuse has occurred and to make recommendations for intervention. The evaluations involved reviewing case records, interviewing alleged victims, interviewing both parents and often other adults, undertaking psychological testing of both parents, and conducting medical exams of children if needed.

Faller and DeVoe concluded that in 31 cases (14.4 percent) the allegations were unfounded, and an additional 14 (6.5 percent) were possibly unfounded. However, 34 of the 45 cases were classified as misinterpretations by the adults making the report and, in 1 case, classification was uncertain. Only 10 of the total sample of 215 allegations (4.7 percent) were determined to be intentionally false, and these 10 allegations actually involved only six parents, since 4 allegations were made by one father.

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[46] The analysis excluded 40 cases because they fell outside of the agency's jurisdiction or the file could not be located.

In a study of 576 reported cases of child sexual abuse (in all contexts) in Denver in one year, Jones and McGraw (1987) found that six percent of the cases involved "fictitious" reports. Five percent of these reports were made by an adult, and one percent were made by children (n=5 cases). The authors defined "fictitious" as cases where professionals did not consider that abuse had occurred. Of the children making the false accusations, the authors state that four of the five:

> ...were disturbed female teenagers who had been sexually victimized by an adult in the past, but had made this current allegation fictitiously...the youngsters had symptoms of post traumatic stress disorder (PTSD) with sleep disturbance, recollection symptoms, and a disturbance of affect (Jones and McGraw, 1987: 30).

While a comparable breakdown of the 26 adult reports was not available, the authors state that 2 adults were parents with major psychiatric disturbances, and other cases had arisen in the context of a custody or visitation dispute. Jones and McGraw (1987: 38) conclude from their study that "fictitious allegations are unusual and that the majority of the suspicions of sexual abuse brought to professional attention prove to be reliable cases."

A study of 350 fully investigated cases involving reported child sexual abuse in the United Kingdom found that 7 percent of the cases (n=24) also involved custody disputes (Anthony & Watkeys, 1991). Further, the investigators found that 8.5 percent of the total number of reports were false and malicious, including 6 percent by adults and 2.5 percent by children.

A study of child abuse allegations in custody and access disputes between parents in Australia collected data on 200 cases from a court registry in each of Canberra and Melbourne (Brown et al., 1998a). The cases were active in the period January 1994 to June 1995, and were followed through to their end or to July 1996, whichever came first. To address the perception that allegations of child abuse in Family Court proceedings were more likely to be part of the family fight about the divorce or separation, the researchers conducted a sub-study of 30 cases. They found the rate of false allegations to be 9 percent, which was the same as the rate for all types of cases reported to the state child protection service. The researchers defined "false allegations" as allegations that were investigated by child protection services and found to be false as opposed to allegations that were investigated but not substantiated (Brown et al., 1998b). According to the authors:

> ...child abuse allegations made in the Family Court were found to be no more frequently false than abuse allegations made in other circumstances; so they cannot be dismissed as weapons manufactured especially for the gender war that often follows partnership breakdown...

The Canadian literature is sparse. A study by Hlady and Gunter (1990) aimed to determine the frequency of custody and access disputes among the patient population of the Child Protection Service at British Columbia's Children's Hospital. Of the 370 children seen, 41 (11 percent) were also the subject of custody and access disputes. Seven of these cases involved allegations of physical abuse, five of which had corroborative positive findings (soft tissue injuries including bruises, scrapes, and old burns). Of the 110 cases where physical abuse was alleged but custody and access was not an issue, only 48 (43.6 percent) had positive physical findings.

In the custody and access dispute group, 34 cases (of a total of 41) involved allegations of sexual abuse. In 6 of these cases (17.6 percent), there were physical findings evidencing sexual abuse. This is comparable to the 219 children seen for alleged sexual abuse not involving custody and access issues, where physical evidence was found in 15 percent of the cases (33 children). Hlady and Gunter (1990) acknowledge that while the issue of false allegations of sexual abuse is a prevalent concern in custody and access cases, it is not reflected in their research. They conclude:

> This study highlights the importance of an exceedingly thorough assessment when any allegation is made. It also demonstrates need for sound research to guide all professionals involved to deal with the dilemma of true or false allegations, whether or not custody is in question (Hlady and Gunter, 1990: 593).

4.1.2 Who is Making the Allegations and Who is Being Accused?

Thoennes and Tjaden (1990) found that the mother was the accuser in 67 percent (n=110) of the cases, the father was the accuser in 22 percent (n=36) of the cases, and in 11 percent (n=19) of the cases a third party such as a grandparent was the accuser. Mothers accused the father (48 percent), the child's stepfather (6 percent), or a third party (13 percent). Fathers accused the mother (6 percent), mother's new partner (10 percent), or a third party (6 percent).

In their study (n=370), Hlady and Gunter (1990) found that the cases were brought to the attention of the Child Protection Services in the following ways: family physician (31 percent); mother (28 percent); Ministry of Social Services and Housing (23 percent); police (10 percent); and father (8 percent). In almost half the cases (46 percent), the father was accused; there was no identified alleged abuser in 51 percent of the cases, and in three percent, the alleged offender was an "other."

4.1.3 Reasons Why Allegations Arise in the Context of Parental Separation

Although Thoennes and Tjaden (1990) found that the rate of sexual abuse allegations in families with custody and access disputes was low (less than 2 percent), they did find that the reported incidence of sexual abuse in families with custody and visitation disputes was six times greater than the reported incidence of child sexual abuse in the general population. The authors suggest several reasons why child sexual abuse may occur more frequently in the context of marital breakdown than in intact families. First, the child sexual abuse may create the stress in the marriage that leads to its breakdown, or indeed the discovery of the abuse may be the reason for the marriage breakdown. Second, the separation may create opportunities of abuse that are not present in intact families. A psychologist is quoted in Thoennes and Tjaden (p. 160) as saying:

> It's not hard to believe that some abuse starts after divorce. If you take parents with such inclinations and make them lonely and needy, and give them a child who is also lonely and scared, and put them together for entire weekends, alone, you've created a perfect opportunity for abuse to occur.

Third, children may be more likely to disclose abuse by a parent following separation because the abusing parent is less able to enforce secrecy, and the other parent is more willing to believe the child (Thoennes & Tjaden, 1990; Fahn, 1991; Fassel, 1988). Additionally, the prospect of a child being alone with an abusive parent during visitation may prompt disclosure by the child (Haralambie, 1999).

Several authors suggest reasons for an unfounded allegation following parental separation. According to Green (1991), the following types of behaviours could form the basis for an unfounded allegation:

- misinterpretation of normal care-taking practices (e.g., washing or drying of the genital or anal area may be viewed as fondling, or a father who permits his frightened child to sleep with him may be accused of sexual seduction);
- misinterpretation of normal sexual behaviours in children (e.g., normal sexual exploration by preschool-aged children including genital stimulation may be confused with behaviours of children who have been molested);
- misinterpretation of common psychological symptoms due to parental separation (e.g., separation anxiety, regressive behaviour, sleep disorders, and phobic symptoms); and
- misinterpretation of physical signs and symptoms in the child (e.g., vaginal irritation or discharge).

Penfold (1997: 16) states that numerous conditions can lead to, or influence, an unfounded allegation of sexual abuse, including:

> …a young child's immature social and communication skills; parent's lack of knowledge re: normal sexuality; misperceptions, e.g., of borderline situations such as sleeping or bathing with the child; confusion re: separation anxiety in young children; an overanxious child with an anxious parent; presence of other types of family violence; abuse attributed to the wrong person; child lying e.g., to seek alternate placement; psychopathology of child or parent; coaching by parent; influence on parent of media exposure about sexual abuse; hostility and mistrust between the parents; child being exposed to pornographic material; child witnessing adult or animal sexuality; sex play with peers; leading and coercive interviewing techniques; excessive interviewing; poor documentation; and cross germination.

As Penfold points out, a parent with feelings of hostility or mistrust may unwittingly begin to engage in suggestive interviewing of a young child about possible abuse, perhaps based on ambiguous physical symptoms. The questioning may require a child to assess whether touching had a "sexual" intent, which a young child may not be able to do. These are circumstances in which an "honest" mistake may easily be made.

4.2 The Ontario Incidence Study of Reported Child Abuse and Neglect and the Canadian Incidence Study of Reported Child Abuse and Neglect

The Ontario Incidence Study of Reported Child Abuse and Neglect (OIS) and the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS) are currently the most comprehensive Canadian sources of statistics on child maltreatment investigations conducted by child welfare authorities. The OIS documents maltreatment investigations conducted in Ontario in 1993 (Trocmé, et al., 1994), and the CIS collected information on investigations conducted across Canada in 1998 (Trocmé, et al., 1997). The first set of findings from the CIS will be available for release in the year 2001. The following section of the paper examines findings from the OIS relevant to situations involving parental separations and discusses the relevant data that the CIS will yield.

4.2.1 Allegations in the Ontario Incidence Study (OIS)

The 1993 OIS was the first Canadian study to examine the incidence and characteristics of reported maltreatment of children (involving alleged physical, sexual, and other abuse). The study is based on a survey form completed by child protection workers on a representative sample of 2,447 children investigated in 15 Children's Aid Societies (CAS) across the province. CAS intake workers completed the two-page information collection form following their initial investigation. This form included questions on case status, family and child demographics, a short risk-factor checklist, sources and reasons for referral, and outcome of investigation (types, severity and duration of maltreatment, perpetrators, placement, and court involvement).

Based on the OIS sample of 2,447 investigated children, estimates can be made of the total number of cases in Ontario opened by CAS because of allegations of child maltreatment. Therefore, it can be estimated that of the 53,000 family cases opened for CAS services in 1993, 36,799 were opened because of allegations of child maltreatment, involving 46,683 children who were the subject of an allegation. There was an average of 1.3 children for every investigated family.

Close to half of the investigations (46 percent) involved children from families where the parents were separated or divorced. The OIS did not, unfortunately, collect information on whether the investigated families were involved in custody or access disputes, or whether there was any contact or involvement with the non-custodial parent. Information about source of allegations and alleged perpetrators can be used, however, to examine situations where separated parents make allegations about one another. For the purpose of the present analysis we refer to these cases as "cross-custody allegations."

Cross-custody allegation estimates were derived by combining two OIS questions: *Question 5. Source(s) of allegation/referral* and *Question 13. Person(s) suspected/responsible for maltreatment*. These two questions theoretically produce four types of cross-custody cases:

(1) Allegations made by a custodial mother or her children against a non-custodial father.

(2) Allegations by a non-custodial father or his children against a mother.

(3) Allegations by a non-custodial mother or her children against a father.

(4) Allegations by a custodial father or his children against a non-custodial mother.

No cases meeting criteria 3 or 4 were identified in the OIS sample. This does not mean that such cases do not exist, but that they are relatively infrequent occurrences (less than 2 percent of investigations) and did not appear in the OIS sample. Therefore we can only present data on cross-custody allegations involving non-custodial fathers (category 1) and custodial mothers (category 2).

It is important to note that these cross-custody allegations are an overestimate of the proportion of cases that actually involve custody or access *disputes*. It is not possible to determine how many of these cross-custody allegations of maltreatment actually involve situations where there is an ongoing custody or access dispute, as opposed to a situation where parents have separated or divorced, but there has been no dispute over custody or access. Given the small amount of Canadian data, however, these estimates may provide an outside limit to help delineate the extent of the problem.

Table 2 provides a breakdown by form of maltreatment and level of substantiation for cases involving cross-custody allegations. While close to half of the maltreatment investigations in Ontario involve families where there has been a separation or a divorce, less than ten percent of investigations involve cross-custody allegations. The proportion of cases involving a custody or access dispute will account for an even smaller proportion of maltreatment investigations. That is, it is much more common in situations where parents have separated for an allegation of abuse to be made against a parent by someone who is not a family member (e.g., a teacher, a neighbour) than for the allegation to be made by the other parent.

Table 2: Characteristics of Investigations of Suspected Child Maltreatment (Neglect and Abuse) Involving Cross-Custody Allegations in Ontario in 1993 (N=2,447)

	Allegations by Custodial Mother Against Non-custodial Father (%)	Allegations by Non-custodial Father Against Custodial Mother (%)	All Other Allegations (%)
Total Investigated Children (Row Percentages)	6	3	91
Primary Forms of Investigated Maltreatment (Row Percentages)			
Sexual Abuse	13	-	87
Physical Abuse	7	3	90
Neglect	3	5	92
Other	3	5	92
Substantiation (Column Percentages)			
Substantiated	23	10	28
Suspected	27	18	32
Unfounded	50	72	40
Malicious/Intentionally False Allegation	1.3	21.3	2.2
Police Investigation	30	10	23
Criminal Charges	7.6	-	6.4

In the context of parental separation, non-custodial fathers were most likely to be investigated because of allegations of sexual abuse made by the mother (13 percent of all sexual abuse investigations). Custodial mothers were most likely to be investigated because of allegations of physical abuse or neglect made by the father. The neglect allegations are noteworthy, given that much of the media focus in the context of custody disputes has been on allegations of abuse, not neglect. It appears that non-custodial fathers are as likely to be concerned about neglect as abuse.

Substantiation

One-half (50 percent) of cross-custody child protection investigations against non-custodial fathers and over two-thirds (72 percent) of investigations against custodial mothers were classified as unfounded by CAS investigators, compared to the unfounded rate of 40 percent for other investigations. Controlling for form of investigated maltreatment, the rate of unfounded cross-custody allegations involving non-custodial fathers is *not* significantly different than the overall rate of unfounded investigations in cases of abuse (48 percent of abuse cases in the OIS were unfounded).

Unfounded allegations should not be confused with intentionally false allegations. The rate of unfounded allegations is comparable to rates in most other jurisdictions across North America. The large proportion of unfounded allegations in all child protection cases in part reflects the fact that professionals and the public have a duty to report suspected maltreatment, not confirmed maltreatment, as well as difficulties in substantiating abuse.

Significantly, only 1.3 percent of allegations against non-custodial fathers were considered by investigators to be intentionally false, compared to 2.2 percent for investigations of abuse and neglect allegations in situations where parental separation was not a factor. Despite concerns about intentionally false allegations in situations involving custody disputes, the investigating workers rarely considered allegations by mothers or children against a non-custodial father to have been intentionally false. In contrast, over one-fifth (21.3 percent) of allegations by non-custodial fathers against custodial mothers were judged to have been intentionally false.

Criminal Charges for Abuse

Cross-custody investigations were as likely to involve police investigations as were other investigations.[47] Charge rates for abuse-related offences against non-custodial fathers (7.6 percent) were comparable to the overall charge rate (6.4 percent), while no cross-custody cases involving mothers as alleged perpetrators lead to charges. However, the OIS underestimated charge rates since it only tracks the first two to three months of investigations, and decisions to lay charges can take longer.

4.2.2 Maltreatment Investigations in Cases Involving Custody Disputes in the Canadian Incidence Study

Using an expanded version of the OIS design, the 1998 Canadian Incidence Study of Reported Child Abuse and Neglect (CIS) was funded by the Child Maltreatment Division at Health

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[47] Controlling for form of investigated maltreatment, given that the police are primarily involved in abuse investigations.

Canada to collect information on child maltreatment investigations conducted across Canada. Including provincially funded over-sampling, the CIS gathered data from over 100 child welfare authorities, yielding a sample of approximately 10,000 investigated children. As with the OIS, the CIS form was completed by investigating child protection workers following the completion of their investigation. A number of additions were made to the OIS form for the CIS study, including an expanded number of questions on health determinants, child injuries and child functioning. Data collection on cases reported between October 1, 1998 and December 31, 1998 was completed in 1999, and the final report for the study is anticipated later in 2001.

The CIS will provide a more complete picture of allegations of abuse in the context of parental separation. Question 7(b) asks whether there is "an ongoing child custody dispute." The CIS also includes questions about substantiation, intentionally false allegations, and police involvement. Analysis of the CIS will be able to determine what proportion of child protection investigations across Canada involve custody disputes, and whether these cases lead to different outcomes or involve unusually high numbers of false allegations.

4.2.3 Limitations of the OIS and CIS Databases

The OIS and CIS gather information from child protection workers upon completion of their initial investigation, usually within the first two months of the initial complaint. The information on intentionally false allegations is somewhat constrained by this design. First, there is no independent corroboration of the investigating worker's judgement that an allegation was intentionally false. However, 73 percent of workers who participated in the OIS had BSW or MSW degrees, 79 percent had over three years of child protection experience, and 36 percent had over six years of experience. In addition, most sexual abuse cases are jointly investigated with the police.

Second, in some cases, information may emerge after the initial investigation that may change the validation status of the investigation. This could be particularly problematic in cases involving criminal proceedings where new evidence could emerge several months, if not years, after the child protection investigation. Likewise, investigations in custody and access cases may take longer than two months.

Third, the OIS and CIS are limited to cases investigated by child protection authorities and do not cover cases that are investigated only by the police. While cases of abuse involving family members are usually investigated by child protection authorities, in some jurisdictions cases involving alleged non-custodial parent perpetrators might be investigated only by the police. It is not possible at this point to estimate the rate of police only investigations (Trocmé & Brison, 1998).

Finally, while the CIS specifically identifies families where there is an ongoing custody dispute, the survey form does not document the details of the dispute. As a result, it is not possible to determine whether an allegation of abuse may have precipitated the separation that has lead to a custody dispute, or whether the allegation emerged following the separation. However, the CIS does document the investigating worker's judgement about the potential malicious intent of a referral. Also, some investigating workers may not be aware of an ongoing custody dispute, thus leading to a potential underestimation of the rate of custody disputes in the context of abuse investigations.

4.3 Study of Reported Canadian Family Law Cases

As part of this research project, a study of reported Canadian family law decisions from 1990 to 1998 was conducted to identify how the courts were dealing with cases involving allegations of child abuse.[48] This study considered all reported judicial decisions that dealt with sexual and physical abuse allegations in the context of parental separation on the Canadian computer databases of Quicklaw in that period. It dealt only with family law cases; child protection and criminal cases were excluded. Quicklaw databases depend on receiving written decisions from judges, and many decisions delivered in Canada are not included in legal databases. Most family law judicial decisions do not result in written reasons and do not appear on legal databases. While this may mean that certain types of decisions are under-represented in the legal databases, there is no more complete set of written judgements than in Quicklaw. This study, at the least, gives a sense of what is happening in many of the highly contentious cases decided by family law judges in Canada.

A review of judicial decisions may not be representative of all cases where abuse allegations are made after parents have separated. For example, in cases where there is strong evidence of abuse, the perpetrator is not likely to contest the issue of abuse in family law proceedings and there may be no reported family law judgement.

In the nine years covered by this review, 196 cases that dealt with sexual and physical abuse allegations in the context of parental separation were identified. Of these, a clear judicial finding on the balance of probabilities (the civil standard) that abuse occurred was made in 46 cases (23 percent). In 89 cases (45 percent), the judge made a finding that the allegation was unfounded, while in 61 cases (31 percent) there was some suspicion of abuse, but no conclusive judicial finding that abuse occurred. In 45 of the cases (30 involving sexual abuse allegations), the judge believed that the accusing party made an intentionally false allegation. That is, the judge believed that there was deliberate fabrication in 30 percent of court cases where abuse was not proven (45/150). In other words, over the nine year period of the study, there were an average of 5 cases per year reported in Canada where the judge believed and reported that the accusing party made an intentionally false allegation.

In the 89 cases where the court found that the allegations were clearly unfounded, the accusing party lost custody in 18 cases, though this was sometimes for reasons not directly related to the allegation of abuse. In only 1 case was the person who made the false allegation charged (and convicted) of a criminal offence—mischief—in connection with the false allegation. In 3 other cases the accusers were cited for contempt of court, usually in connection with denial of access. In the 46 cases where abuse was found, access was denied in 21 cases, supervised access was granted in 16 cases, and the alleged abuser faced criminal charges in only 3 cases.

The cases involved 262 alleged child victims (74 percent of them involving alleged sexual abuse), of whom 32 percent were under five years old, 46 percent were five to nine years old, 13 percent were ten or older, and in 9 percent the age was unspecified.

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[48] Portions of that study are discussed at Bala & Schuman, "Allegations of Sexual Abuse When Parents Have Separated" (2000), 17 Can. F.L.Q. 191-243.

The study found that about 71 percent of the allegations were made by mothers (64 percent custodial and 6 percent non-custodial), 17 percent were fathers (6 percent custodial and 11 percent non-custodial) and 2 percent were from grandparents or foster parents. In about 9 percent of the cases, the child was the prime maker of the allegations (and often testified in court). Fathers were most likely to be accused of abuse (74 percent), followed by mothers (13 percent), mother's boyfriend or a stepfather (7 percent), grandparent (3 percent), and other relatives, including siblings (3 percent).

4.4 Perceptions of Key Informants

Given the lack of relevant Canadian research regarding the issue of allegations of abuse, we decided to conduct a small survey of key informants to examine a number of issues, including the extent and nature of false allegations. It was hoped that the information from the key informants would corroborate the information gathered through the review of research literature and case law. While the total number of informants interviewed was very small (due to the time constraints of this review), they were chosen on the assumption that they were likely to have professional experience with allegations of child abuse.

The key informant interviews were conducted by telephone with selected child welfare workers/supervised access providers (two police, three judges, one lawyer and a researcher). Key informants were identified through contacts known to the authors. A total of 24 people were called, including a child welfare worker from each province and territory in Canada. Nine people could not be reached or did not return our calls, and one person asked to respond in writing, but did not complete the interview schedule. Ultimately, 14 key informants were interviewed from eight provinces and territories and one state. Key informants were from British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia, Newfoundland, Yukon, Northwest Territories and Colorado.

A variety of questions were asked on the extent of the problem, as well as on investigative processes (see Appendix A). Overall, there was significant consistency among the key informants, regardless of their professions. Due to the economic and time constraints of this project, the key informant interviews were limited in number and cannot be construed as representing the experience of the various professions encountered. However, they were useful in putting the problem of false allegations of abuse in custody and access cases into context and in identifying issues. The interviews are summarized below according to the extent and the nature of the problem, the adequacy of current legislation, the investigative processes, and the limitations on access.

4.4.1 Extent and Nature of the Problem

Almost all of the key informants (thirteen) said they had some direct experience with cases of false allegations of child abuse, although most (nine) said they were a relatively rare occurrence. In most cases (eight) the false allegation involved sexual abuse, but some respondents reported having cases involving false allegations of physical abuse (five) and neglect (three) as well. When asked if they had any cases that could be classified as "clear cases of mischief, obstruction of justice or perjury," four of the key informants said no, and ten said yes, but they were very rare (e.g., "less than one percent" or "maybe one case per year").

Key informants were split on whether the incidence of false allegations of child abuse was higher in cases involving custody and access disputes than in other settings. For both cases of intentionally false allegations (or clear cases of mischief, obstruction of justice or perjury) and false allegations due to honest mistakes, four respondents said the incidence was not higher in cases of custody and access disputes. However, eight said it was higher or marginally higher, and one informant said that there is "no question it is [higher]." One respondent who thought the incidence of false allegations due to honest mistakes might be slightly higher in the context of parental separation than other settings said "it's easier to believe something bad [misinterpretation] at the point of separation than when you're living with that person." Another said "the dynamics in this context are stressed because there may be: (1) parenting issues; or (2) poor communication between the parents."

One-third of the key informants (five) thought that the problem of false allegations, both intentional and unintentional, has increased compared to ten years ago. About one-third (four) thought that while allegations of child abuse have increased compared to ten years ago due to increased public awareness and education, the problem of false allegations has not increased although it has gained public attention. A further one-third (four) did not think that the problem of false allegations has increased. One respondent said that "if anything, the problem has diminished due to police being better trained at interviewing."

When asked if they had experience with cases of intentionally false allegations of child abuse being made repeatedly in the same case (i.e., within the same family), over half of the key informants (eight) said yes, but that it is not common. One respondent said a typical scenario would involve a three- to four-year-old child, whose mother comes back repeatedly with more stories. Another said that there are "certain problem families, but they are few in number." Another said, "it can happen if there are siblings…there is a ripple effect."

Most key informants (ten) said it is usually the mother or primary caregiver who makes an intentionally false allegation of child abuse against the father, although seven respondents said fathers also make intentionally false allegations of child abuse against mothers. Two respondents reported having cases involving teenaged girls or older children who make false allegations, and one said close to one-third of the false allegations of abuse are made by children. When asked if children are being coerced or manipulated by custodial parents to make accusations against non-custodial parents, eight key informants said no, or it was very rare. Four key informants thought children were sometimes being coerced or manipulated by a parent.

4.4.2 Adequacy of Current Legislation for False Reporting

Key informants were asked if they thought the problem of intentionally false allegations of child abuse required a stronger legal remedy than that which is currently available. Respondents overwhelmingly said no (twelve). One respondent said, "You are taking an emotionally charged issue and trying to remedy it with a criminal penalty—this just will not work." Some respondents said that adequate legislative provisions are already in place, but are not being used. One key informant said, "It's there if we want to proceed with charges, but police and child welfare agencies deal with the best interests of the family unit and use other resources." One respondent said obstruction of justice is a broad charge, and therefore it is more useful to prosecutors than would be a provision, if enacted, for a specific offence related to false allegations in the context of custody and access disputes. Two key informants thought sentencing could be more punitive in this context.

When asked if they were concerned that stronger legal sanctions against people making false allegations would discourage legitimate reports of abuse, half of the key informants (seven) said yes or there was that risk, and half (seven) said no or they did not think it would make any difference. One key informant said, "You would eliminate the people who suspect something is happening but have no evidence." Another said, "No, as long as the statement of sanctions was clear that only allegations made maliciously would be addressed."

4.4.3 Investigative Processes

Only the seven key informants who were child welfare workers or police officers were asked questions regarding the investigative processes involved when there are allegations of child abuse. None of the key informants said that their organizations had a specific protocol for responding to allegations of child abuse in the context of custody and access disputes. One respondent said that their general protocol included a caution not to discount an allegation just because it came in the midst of a custody and access dispute. Most key informants (six) said their organizations did not provide specific training on the dynamics of child abuse allegations in situations of parental separation, although one organization did address the issue. Another was in the process of developing a training course on this topic, and one was aware of a course that was recently dropped due to lack of funding.

Key informants were asked how long they had to begin an investigation when an allegation of child abuse is made, whether or not the allegation occurs in the context of parental separation. All seven respondents said that it depends on the safety risk to the child. Responses ranged from immediate response, to within 12 hours, 24 hours, 2 days, 5 days, 15 days or 21 days—depending on the risk assessment. When asked how long a child protection investigation typically lasts, most key informants (five) said 14 to 21 days, although one respondent said if a case goes to court, it could last two years. Cases involving allegations of abuse against a non-custodial parent when parents have separated are complex, but pose relatively little immediate risk to a child, and may take longer than average to complete. All key informants said that statements that are taken from the person reporting the abuse are usually not sworn, although one key informant said that more are sworn now than previously because of recent court decisions.

4.4.4 Limitations on Access

All fourteen key informants were asked questions regarding limitations on access during investigations. When asked if access rights of non-custodial parents were being denied during typical child abuse investigations, the responses were varied. Half of the respondents (seven) said that access rights were denied or limited during the investigation, which was usually a brief period. Three respondents said that access rights could be denied for "awhile" and three respondents said no, or they did not know.

Almost all respondents (thirteen) were aware of services in their jurisdictions for supervised access. Respondents said child welfare agency workers, contracted workers, court service workers, family members, homemakers, and the community provided supervision. One key informant was aware of a supervised access centre funded by the government or by the parties.

However, when asked if the current supervised access services were adequate, only two respondents said yes. Half the respondents said that there were not enough resources and the user-pay services were too expensive and therefore not available to many families. One respondent mentioned the need for after hours supervision (e.g., evenings and weekends); another said there was a need for court-defined expectations and trained supervisors, and one said there needs to be a standardization of supervised access services. One key informant said that "supervision is not a solution in itself—it is a short-term remedy to allow parents to contact while something else happens."

5.0 ISSUES RELATED TO ALLEGATIONS OF CHILD ABUSE IN THE CONTEXT OF PARENTAL SEPARATION

The information in this report was obtained from a variety of sources. These sources include a literature review of available research information in Canada and other jurisdictions and a review of the current Canadian legislation and case law regarding child abuse allegations in the context of parental separation. In addition, a limited number of practitioners were interviewed regarding their experiences with cases involving child abuse allegations where parents have separated or divorced. Based on this information, a number of significant issues can be identified. This chapter discusses the key issues under the following general categories: (1) Research Issues; (2) Investigative Issues; (3) Legal Issues; (4) Social Issues; and (5) Education and Training Issues.

5.1 Research Issues

5.1.1 The Incidence of False Allegations of Child Abuse

The lack of research studies, particularly Canadian studies, means we do not know the actual incidence of abuse allegations in cases in which parents have separated, or the proportion of these cases in which the allegations are intentionally false. However, it appears from Canadian and American studies, as well as from information obtained from the key informants, that allegations of physical or sexual abuse occur in a relatively small portion of cases in which parents have separated. Some research suggests that abuse may be an issue in less than two percent of separations, though other research suggests that in some locales abuse allegations might occur in five to ten percent of contested custody and access cases.

Distinctions must be made between:

- false allegations that are deliberately or recklessly made to gain a tactical advantage in a custody or access dispute;
- unfounded allegations that are made due to honest mistakes; and
- allegations which cannot be conclusively proven.

The literature and case law are inconsistent in the terms used to describe the outcome of an investigation into an allegation of child abuse. The distinction between intentionally false allegations and false allegations due to honest mistakes or mental health problems is very important, although many studies do not differentiate false allegations by their source. There are very significant differences in how children may be affected in these situations and the consequences for the people making false allegations of each type should be very different.

While some literature and research suggests that the incidence of unfounded and intentionally false allegations of abuse is higher when parents have separated than in other contexts, neither the literature nor key informants were uniform in their support of this theory. It appears that most of the false allegations of abuse are not due to deliberate lies or manipulation, but to honest mistakes and poor communication. This type of research could be undertaken as part of a broader study about how courts deal with custody and access disputes, or as a more focussed study.

5.2 Investigative Issues

5.2.1 Length of Time Required to Investigate Cases Involving Allegations of Child Abuse

In most Canadian jurisdictions, child protection agencies take the lead in investigating allegations of child abuse. Usually, the agency begins by ensuring the immediate safety of the child. For example, if the allegation is made against an access parent, the agency may "request" that the access parent voluntarily suspend visitation or agree to supervised access until the investigation is complete. Generally, the parent accused of abuse will want to appear co-operative, and the parent's lawyer may caution that a court is also likely to "err on the side of caution" at this initial stage. Therefore, the parent will usually agree to restrictions on contact with the child. Alternatively, the agency may ask a court to suspend the visitation rights of the parent suspected of child abuse under child protection legislation.

Given the resource constraints facing child protection agencies, it is not surprising that once the immediate threat to the child's safety is removed through the suspension or supervision of access, investigations of suspected abuse tend to be a low priority and may proceed slowly. Further, these are complex cases requiring careful assessment, and the investigation may take months to complete. If the agency concludes that abuse perpetrated by a parent has occurred, the agency has legal authority to seek a court order to protect the child.

If a child protection worker believes there is strong evidence of serious abuse, the worker, in addition to taking protection steps, is likely to contact the police to allow them to investigate and decide whether criminal charges should be laid. In many communities there is a "protocol" to direct how a joint investigation is to be conducted. Occasionally, a parent who is alleging abuse in the context of parental separation will directly contact the police. Frequently, in cases arising out of parental separation, the police are only informed a considerable time after the initial alleged "disclosure" is made, complicating the police investigation. Given the nature of the criminal process, criminal charges will be laid only when there is very strong evidence of abuse and simultaneous criminal and civil proceedings are not common, though this does occur.

When key informants were asked how long a child protection investigation typically lasts, the largest group (n=5) chose 14 to 21 days. At the extreme, one respondent said if a case goes to court, it could last two years. Cases involving allegations of abuse against a non-custodial parent when parents have separated are complex, but pose relatively little immediate risk to a child, and may take longer than average to complete.

5.2.2 Availability of Protocols for Investigating These Cases

Probably the major difficulty with investigations is that some of the investigators, assessors and other "experts" involved in these cases lack the sophisticated experience, skills and knowledge to deal effectively with the type of child abuse case where there is rarely medical evidence to corroborate an allegation. Many of the behavioural patterns that may be consistent with a child having been abused by a parent may also be consistent with a child suffering from the effects of a high conflict parental separation. Some research suggests that mental health professionals have considerable difficulty in reliably assessing whether young children have been sexually abused based solely on observing an interview of a "disclosure."

Only key informants who were child welfare workers or police officers were asked questions regarding the investigative processes involved when there are allegations of child abuse (n=7). None of the key informants said that their organization had a specific protocol for responding to allegations of child abuse in the context of custody and access disputes. One respondent said that their general protocol included a caution not to discount an allegation just because it came in the midst of a custody and access dispute. Most key informants (six) said their organization did not provide specific training on the dynamics involved with allegations of child abuse in situations of parental separation, although one organization did address the issue. Another was in the process of developing a training course on this topic, and one was aware of a course that was recently dropped due to lack of funding.

5.3 Legal Issues

5.3.1 Unfounded Allegations: Misunderstanding, Fabrication or Mental Disturbance?

There is a range of circumstances that may lead a parent to make an unfounded allegation of abuse in the context of parental separation. Situations of unfounded allegations can be regarded as arising when:

(1) allegations are made in the honest but mistaken belief that abuse has occurred, often due to some misunderstanding or misinterpretation of events by the complainant or misapprehension on the part of a recipient of a complaint;

(2) unfounded allegations are made knowingly with the intent to seek revenge or manipulate the course of litigation; or

(3) unfounded allegations are made as the result of a mental disturbance by the accuser.

In some cases, it may be difficult to determine which of these factors, or what combination of factors, resulted in the false allegation being made. It must also be appreciated that in the legal context there may be cases where the allegations are in fact true, but where a judge has made a finding that the allegation was not proven.

In the majority of cases of unfounded allegations, the accusing parent has an honest but erroneous belief that the child has suffered some form of abuse. In such cases the allegation might, for example, arise from misinterpretation of a young child's answers to questions about having red genitalia after a visit, or a misunderstanding about innocent conduct, such as parental nudity or bathing with a young child. For example, in the British Columbia case of *K.E.T.* v. *I.H.P.*,[49] the mother's concerns about possible sexual abuse began when the three-year-old child returned from a period of shared custody with her father and was "very upset." The child reported that she had showered with her father, though this was not the source of the girl's concern. The mother, who was in the process of dealing with her own experiences as a victim of childhood abuse, began to question the young child about whether her father had ever given her a "bad touch" and the child apparently pointed to her vagina.

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[49] [1991] B.C.J. 133 (S.C.); see also *M. (P.A.)* v. *M.(A.P.)*, [1991] B.C.J. 3020 (S.C.) per Errico J.

The mother contacted social services and the police, who began an investigation. The father's contact was immediately reduced from shared custody of the two children (the girl and her older half brother) to very limited supervised access. The mother was genuinely concerned that the children had been sexually abused; the children clearly identified with the mother and began to tell investigators that they did not want to see the father (stepfather to the boy). Various mental health professionals and physicians became involved and most of them concluded that the children had not been sexually abused, although the older boy, then about eight, made some vague "disclosures" that his stepfather may have touched his penis when he was three or four.

By the time the case came to trial the father had almost no contact with the children for a year. Justice Prowse concluded that the mother's "preoccupation with sexual abuse rubbed off on the children," which explained the vague "disclosures" of abuse. The judge accepted that the mother had not "consciously encouraged or coached the children" to say that they had been abused and that the mother "honestly believed that her children had been sexually abused" and that her actions, including moving from British Columbia to Ontario, were "motivated by a desire to protect." The judge concluded that the father had not sexually abused either child, though by the conclusion of the trial his relationship with the children was "troubled." The judge recommended counselling for the children and parents, and concluded that the man should not have access to the older boy, who by this time was refusing to see his stepfather. The father was awarded access to his daughter, to be supervised, "out of an abundance of caution," for the first three weekend visits.

In the minority of unfounded cases,[50] the judge will conclude that the accusing parent was intentionally making a false allegation, as occurred in one Manitoba case, where the judge concluded:[51]

> It is patently obvious from the evidence and the manner in which it was given that the mother thereafter set out to punish the husband for the embarrassment that he had caused her. The only ways she knew of were to deprive him of property (she took all of the furniture) and their son. Her motivation was revenge, pure and simple.... I conclude that she never believed that her son had been abused, not when she reported the abuse and not now.

There are a number of cases in which it is apparent that the accusing parent is suffering from some form of mental disturbance that results in the making of an unfounded allegation. Sometimes in these cases a mental health professional will testify about the accuser's mental disturbance, which may be related to that person having been abused as a child. For example, in one British Columbia case the custodial mother terminated the father's access and made sexual abuse allegations that the police and child welfare services investigated and found to be without substance. The father was granted interim custody while the mother continued to make the allegations in the local media and court. The mother was seen by a number of mental health professionals, including a psychologist retained by the lawyer appointed for the child, who concluded that the mother was suffering from a "delusional disorder." The judge terminated the mother's access, commenting:[52]

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[50] See discussion in Section 4.3. In the case law review, judges concluded in 45 out of 150 reported cases, that where abuse not proven, there was deliberate fabrication.

[51] *Plesh* v. *Plesh* (1992), 41 R.F.L. (3d) 102(Man Q.B.).

> For the past two years, the defendant [mother] has persisted in allegations that S. [the child] has been ritualistically abused by a cult or occult group. Extensive investigations have proven those allegations to be unfounded but the defendant, who has been diagnosed as suffering from a delusional disorder, continues to assert repeatedly...that S. has been abused.

In some cases, the accusing parent's mental state may affect his or her perception of reality, so it is not clear whether an unfounded allegation is being made honestly, manipulatively, or as a result of mental disturbance. For example, in one Ontario case, protracted custody litigation went on for three years between parents who were both physicians. The case centred on the mother's sexual abuse allegations. Although the young child made some "disclosures" of sexual abuse to investigators, it became apparent that these were a result of her mother's influence. The allegations were thoroughly investigated by child welfare workers, the police and the Suspected Child Abuse and Neglect team at the Hospital for Sick Children in Toronto, who all concluded that they were unfounded, though there was support for the allegations from some less experienced mental health professionals, including the mother's therapist who purported to conduct her own "assessment" and concluded that the child had been abused. Justice Janet Wilson rejected the allegations and concluded that the mother was "an emotional, at times irrational person...she has exaggerated, dramatized and modified her evidence to adjust to her reality. This adaptation may be conscious, unconscious or a combination of both."[53] The child had spent nine months in a foster home during the proceedings; custody was awarded to the father with supervised access to the mother.

In child-related litigation, judges usually do not follow the ordinary rule of civil litigation to order the unsuccessful party to pay at least a portion of the legal costs of the successful party. Generally, no order for payment of costs is made in custody or access cases. However, in cases where a judge believes that a parent has made a groundless allegation for the purpose of gaining a tactical advantage in custody or access litigation, the judge will sometimes order the accusing parent to pay the costs of the parent who was unfairly accused of abuse. Judges are most likely to do this if the accusing parent has proceeded to trial in the face of clear professional advice that the fears of abuse are groundless and the accusing parent appears to have manufactured evidence.[54]

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[52] *H.B.M.* v. *J.E.B.* [1998] B.C.J. No. 1181 (S.C) per Allan L.J.S.C.

[53] *M.K.* v. *P.M.*,[1996] O.J. 3212 (Gen. Div.).

[54] See e.g., *T.(C.L.)* v. *P.(E.)* (1999), 45 R.F.L.(4th) 91 (Alta. C.A.); and *Scott* v. *Scott*, [1990] O.J. 607 (S.C.) where Fitzgerald J. recommended that the Director of Legal Aid should exercise his discretion to assist a father falsely accused of sexual abuse with his legal fees, since the mother was indigent and her lawyer had been paid by legal aid. Although the father has a substantial income he was heavily in debt as a result of the litigation. The judge commented: "The protracted litigation was made possible by legal aid financing [the mother's legal expenses] and I feel it only fair that legal aid bear the consequences [and assist the father]."

5.3.2 Children Making False Allegations

As reported above, most cases of false allegations arise out of the misinterpretation, distortion, suggestion or even manipulation of a child's statements by the accusing parent, or even outright fabrication by the parent. There are, however, a few reported cases of false allegations where the child is taking the lead in making the allegation; the child repeats the statements to investigators or even in court, but the judge ultimately concludes that the allegations have been fabricated by the child. These cases involve older children, often preadolescent or adolescent girls, who may be manipulative or emotionally scarred by the process of separation. In some cases, the child may be subtly encouraged by a parent to make these false allegations. In other cases, the false allegation may arise from a child's desire for revenge against a father who has left the home, or from a desire to remove a person, such as a stepfather, from the child's life.[55]

In the British Columbia case of *G.E.C.* v. *M.B.A.C.*,[56] the parents separated when the two girls were very young. After an initial trial in 1992, in which the mother made allegations of sexual abuse that were not proven, the mother had custody of the two girls and the father had generous access. The litigation had been very stressful and the girls were seeing various counsellors. The older girl, in particular, became upset when the father began to live with a new partner and announced plans to marry her. About two years after the first trial, when she was about eight, the older girl reported to her mother that during an access visit the father had slid his hand down the back of her trousers into her "bum hole." The disclosure was reported to police and social services, and a psychiatrist who had been working with the children also carried out an assessment. The investigators and psychiatrist concluded that the allegation was unfounded, with the psychiatrist noting that the child reported the allegation without emotional affect and could give no context or details. The child's psychiatrist concluded that the girl was the "central player" who was attempting to manipulate her father, although the mother was "only too willing to accept what [the child] says at face value." In a 1995 trial, Justice Newbury concluded that the allegation was unfounded and awarded custody to the father, with the mother to have limited supervised access, and recommended counselling for the children. The change in custody was not on the basis of the "fault" of either party, but rather because of the mother's lack of parenting skills and hostility and the "psychological damage" suffered by the girls while in their mother's custody.

Of course, great care must be taken to not improperly dismiss allegations in cases where the child is making the allegation, as the child may well be telling the truth. Even a recantation by the child does not mean that the allegation was false, but it may instead reflect "accommodation" by the child to the pressure of the accused or other family members, or feelings of guilt or shame. A false allegation by a child is often symptomatic of emotional distress; such children often need counselling.

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[55] See Green, "Factors Contributing to False Allegations of Child Sexual Abuse in Child Custody Disputes" (1991), *Child & Youth Services, 15*(2), 177-189.

[56] [1995] B.C.J. 1810 (S.C.) per Newbury J. See also *D.R.P.* v. *D.J.P.*, [1997] B.C.J. 2024 (S.C.) where a girl made allegations of physical, emotional and later sexual abuse against her mother. After the initial allegations were made, child welfare authorities transferred care of the child to the father. The family law judge ultimately found that the allegations of physical and sexual abuse were without substance, but that the 11-year-old girl had a troubled relationship with the mother; the father was awarded custody and the mother was given access one weekend per month.

5.3.3 Making an Unfounded Allegation—Effect on Family Law Decisions

In most reported cases where a judge decided that an abuse allegation by a custodial parent was unfounded, the accusing parent continued to have custody,[57] though in some cases the judge warned the accuser that if he or she persisted in making unfounded allegations of abuse, custody might be varied. Those cases in which a judge was most likely to reverse custody (or terminate access if the allegation was made by an access parent), were ones where the accuser appeared to be suffering from an emotional disturbance that contributed to the making of the allegation, or appeared to be so hostile towards the wrongfully accused parent that the children would suffer.

An example of a case where the accusing parent lost custody is the Ontario decision of *Ross* v. *Aubertin*.[58] Following separation and the establishment of joint custody for a young girl, the mother repeatedly made allegations of physical and sexual abuse against the father, in particular to doctors. The physicians could find no evidence to support the allegations and began to have concerns about the effect on the child of relatively intrusive medical examinations and of the mother's open discussion of her allegations in the presence of the child. Assessors from the Family Court Clinic expressed similar concerns and concluded that the father was more "child-focused and more likely to promote a positive relationship with both parents." Counsel for the child expressed "great concerns about the [lack] of insight of a parent who would continually make these false allegations and not be apparently aware of the risk to the child." The judge terminated the mother's custody and awarded custody to the father, with reasonable access to the mother.

In some cases, it is the access parent who makes the unfounded abuse allegations. In *D.F.* v. *A.F.*,[59] after the parents separated, the mother was feeling great stress and consented to the father having custody. Over the next few years the mother made several unfounded complaints to the child welfare authorities and police about alleged abuse by the father. There was considerable difficulty about access. On one occasion, the mother assaulted the father's new partner in the presence of the child, and invited the child, then aged five, to join in the attack. The mother was criminally charged and wanted the boy to testify in the criminal case, though the Crown prosecutor prevented this. The mother regularly tried to involve the child in her disputes with the father, showing the child all the court papers and questioning the child about his meetings with the Children's Lawyer. In family law proceedings, the judge referred to the mother's "harassment" of the father and stepmother, and expressed concerns about the "outrageous" conduct of the mother and her failing to recognize the harm caused to the child by the repeated investigations arising from her accusations. The judge nevertheless allowed the mother to have access on alternate Saturdays, supervised by the maternal grandmother, as well as ordering that the child should receive counselling.

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[57] See discussion in Section 2.1.2. See e.g., *D.W.H.* v. *D.I.S.*, [1997] O.J. 3074 (Gen. Div.); *M. (S.A.J.)* v. *M. (D.D.)*(1998), 40 R.F.L. (4th) 95 (Man. Q.B.).

[58] [1994] O.J. 806 (Prov. Div.) per Pedlar J. See also *R.S.S.* v. S.N.W., [1994] O.J. 1572 (Prov. Div), per Zuker Prov. J.; *V.A.L.* v. *J.F.L.*, [1994] O.J. 642 (Gen Div) per Pardu J; *Metzner* v. *Metzner* (1997), 28 R.F.L.(4th) 166 (B.C.C.A.); *A.L.J.R.* v. *H.C.G.R.*,[1995] O.J. 4226 (Prov. Div.) per Fisher Prov. J.; *Scott* v. *Scott*, [1990] O.J. 607; *S.W.C.* v. *T.L.C.*, [1996} O.J. 4577 (Gen. Div.) per Fleury J.; and *Bartesko* v. *Bartesko* (1990), 31 R.F.L.(3d) 213 (B.C.C.A.).

[59] [1998] O.J. 3198 (Gen. Div.) per Lack J.

Where the non-custodial parent makes repeated unfounded allegations that result in intrusive assessments and investigations, this can cause real harm to the children. It demonstrates insensitivity to the interests of the children and a manipulative personality. In such cases, a judge may well suspend access rights to the accusing parent.[60]

On the whole, judges do not appear to be reducing the parental rights of those who make "honest mistakes" that result in allegations that are ultimately not proven in court, provided their continued relationship does not pose a risk to the welfare of the child. On the other hand, if the accusing parent appears to be mentally unstable or deliberately undermining the relationship of the child with the other parent, these are factors that the court will consider.

The review of Canadian family law cases showed that in 89 cases where the court determined that the allegations were unfounded, the accusing party lost custody in 18 cases (but this was not always directly related to the allegation of abuse). Only one person who made a false allegation was charged (and convicted) of mischief in connection with the false allegation, although the accusers were cited for contempt of court in 3 cases, usually in connection with denial of access. In the 46 cases where abuse was found, access was denied in 21 cases, supervised access was granted in 16 cases and the alleged abuser faced criminal charges in 3 other cases.

The caselaw suggests that when there is an allegation of abuse, most judges will tend to "err on the side of caution," pending a full hearing. Generally, judges are prepared to suspend unsupervised access at the interim stage if there are abuse complaints. However, it appears this is done because of the governing principle to protect the child's best interest. As explained in the written decisions, judges are sympathetic to the apparent injustices that can arise for a parent due to that decision, but the court cannot allow sympathy for a parent to interfere with the risk of harm and concerns about best interests of the children.

5.3.4 Dealing with the Uncertain Outcome

Ultimately, there may be cases in which judges, professionals and parents have to accept that there are *reasonable suspicions of abuse, but not sufficient proof to convince a court*. Learning to live with uncertainty may be an aspect of some of these cases; it is often possible to take steps to protect the child against the *possibility* of further abuse without completely terminating contact with a *suspected* abuser. This may be done, at least for a time, through supervision of access, first in a neutral setting and perhaps eventually in the home, provided that the supervisor is a person committed to the welfare of the child.[61] In some cases, concerns about physical or even sexual abuse may be a result of inappropriate parenting as opposed to a desire to exploit a child, and mandatory counselling or education of the parent may be appropriate.[62] A long-term plan to ensure the safety of the child may include therapy by a skilled neutral professional, who can both provide support for the child after the stresses of litigation and monitor for possible abuse.[63] There may also be a rate for lawyers or other advocates for children to attempt to provide on-going monitoring in these cases. In some cases, educating the child about inappropriate touching and the need to report is useful, though it must be recognized that some children may be too young or otherwise unable to protect themselves.

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[60] See e.g., *Jeanson* v. *Gonzalez*, [1993] O.J. 3269 (Gen. Div.) MacLeod J. terminated access to a mother who repeatedly made false allegations of sexual abuse against the two fathers of her two daughters, each of whom had custody. In *J.K.L.* v. *J.S.H.*,[1997] O.J. 1305 and *A.H.T* v. *E.P.*, [1997] A.J. 739 (Alta Q.B.) unfounded allegations of abuse were made against the custodial mother and the accusing parties (the father and grandparents respectively) lost access rights.

[61] See Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 213-16; and Bross, "Assumptions About Child Sexual Abuse Allegations at or About the Time of Divorce" (1992), *1(2) Journal of Child Sexual Abuse* 115.

There are also cases in which the judge determines that the allegation of abuse is unfounded but the accusing parent is unwilling to accept that conclusion and "goes underground" rather than expose the child to the prospect of further abuse. In some cases, the abducting parent may be correct and the judge was indeed wrong to have concluded that abuse did not occur.[64] In other cases, the abducting parent may be the one who is wrong and may be suffering from some form of mental disturbance, perhaps a consequence of her own history of childhood abuse.

5.3.5 Children's Evidence in Family Law Cases— The Admission of Hearsay Evidence

It is quite rare for children to testify in family law cases, as lawyers and judges recognize the emotional stress that will inevitably arise if the child is forced to testify in court and openly "take sides" with one parent against the other.

In most cases, judges receive hearsay evidence about the child's out-of-court disclosures to people such as parents or professionals like social workers or police officers about alleged abuse. In some cases, one of the parties will introduce a videotape of an investigative interview with the child,[65] though it is not necessary to have this type of evidence for the court to hear about the child's out-of-court statements. Relatively few family law cases discuss the legal basis for the admission of hearsay evidence. The decisions that consider the issue usually cite the Supreme Court of Canada decision in *R.* v. *Khan*[66] for the general principle of admission of hearsay evidence if it is "necessary" to admit such evidence and it is considered "reliable." The circumstances of the disclosure are often considered in determining the element of reliability, while the "necessity" may arise out of the desire to prevent the emotional harm that might be caused the child by testifying in court or because the child is considered too young to be a competent witness in court.[67]

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[62] *C.A.S. Waterloo* v. *B.D.* [1991] O.J. 2398 (Prov. Ct.) was a child protection case involving allegations of sexual abuse against a father who was separated from the mother of their two girls. Robson Prov. J. was ultimately not satisfied, on the civil standard of proof, that abuse had occurred, but he was sufficiently concerned to take steps to try to protect against the possibility of future abuse. He concluded that there was a "substantial risk of sexual abuse occurring" during visits, and ordered that the father should take a parenting course, as well as a course on the effects of child abuse on children as a condition of his visitation with the children. The allegations arose following a mother's report of complaints by her six-year-old daughter about the father's touching of the girl's vulva while bathing her during an access visit. The mother initially reported her concerns to a doctor, and then to the Children's Aid Society and the police. The decision in *C.A.S. Waterloo* v. *B.D.* reflects a judicial effort to deal with uncertainty about an abuse allegation without unduly jeopardizing the welfare of children. In part the decision also may reflect a response to what the judge referred to as "inexcusable" record keeping and "bias" by the Children's Aid Society worker responsible for investigating the allegations. The judgment emphasized the need for investigators in these cases to maintain the reality and appearance of objectivity and fairness.

[63] See e.g., *N.(D.)* v. *K.(B.)* (1999), 48 R.F.L. (4th) 400 (Ont. S.C.).

[64] In one infamous American case the mother, Elizabeth Morgan, was jailed for contempt of court for refusing to allow an abusive father to visit their daughter; only later was it conclusively established that the judge was wrong to conclude that the father was not sexually abusing his daughter during access visits. A network of American feminists—the "Underground Railroad"—helps women and children to "disappear"; see Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 194-197; and Haralambie, A.M., *Child Sexual Abuse in Civil Cases: A Guide to Custody and Tort Actions*. (1991), Chicago, IL: American Bar Association.

[65] See e.g., *H.* v. *J* (1991), 34 R.F.L. (3d) 361(Sask. Q.B.) and *Z.M.* v. *S.M.*, [1997] O.J. 1423 (Gen. Div.).

In some cases the judge will admit testimony about the child's out-of-court disclosure not for its truth, but as evidence of the child's state of mind. For example, the judge may consider whether the disclosure reveals a fear of the alleged abuser.[68] If a person is testifying as an "expert witness," whatever the child told the expert may also be admissible as the basis of their opinion evidence. It is evident that judges in family law cases feel the burden of making decisions about abuse allegations and generally take a flexible approach to evidentiary issues, wanting to receive as much reliable information as possible before making such a difficult decision.

However, there are a few reported cases in which the court ruled that statements by children made to parents involved in a custody or access dispute are inadmissible as they could not satisfy the *Khan* requirement of being "reliable," considering the potential for the children to say what they thought the parent wanted to hear.[69]

Although it is rare, children sometimes testify in family law cases involving abuse allegations. Their evidence is entitled to careful consideration by the court, but judges appreciate that a child who is testifying may have been manipulated or coached into making an unfounded allegation or, if denying a previous allegation, pressured into falsely recanting.[70]

5.3.6 The Role of Assessors and Experts

Assessors, mental health professionals and police and child welfare investigators play an important role in resolving cases where abuse allegations are made; few of these cases proceed without some type of "expert" involvement. Indeed, in most cases in which serious allegations of abuse are made, there are likely to be a number of professional investigators and assessors involved.

One of the difficulties in this area is that some of the assessors, investigators and other "experts" involved in these cases lack the sophisticated experience, skills and knowledge to deal effectively with this particular type of child abuse case, where there is rarely medical evidence to corroborate an allegation. Many of the behavioural patterns that may be consistent with a child having been abused by a parent may also be consistent with a child suffering from the effects of a high conflict parental separation. Some research suggests that mental health professionals have considerable difficulty in reliably assessing whether young children have been sexually abused based solely on observing an interview of a "disclosure."[71]

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[66] [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92.

[67] *J.A.G.* v. *R.J.R.* [1998] O.J. 1415 (Fam. Ct.), and *E.S.* v. *D.M.* (1996), 143 Nfld. & P.E.I.R. 192 (Nfld. U.F.C.).

[68] See e.g., *G.E.C* v. *M.B.A.C.*, [1995] B.C.J. 1810 (S.C.) Newbury J., footnote 1.

[69] *M. (L.E.)* v. *M. (P.E.)* (1996), 22 R.F.L. (4th) 83 (Alta. C.A.).

[70] In *E.H.* v. *T.G.* (1995), 18 R.F.L.(4th) 21(N.S.C.A.) the appeal court discounted testimony of a child who testified at trial she may never have been abused and previous allegations were "dreams."

In practice, it is likely that many cases are resolved without trial once the investigators and other experts have assessed the merits of an allegation. A parent is less likely to pursue a matter to trial if all of the "expert" evidence supports the position of the other party. Where the initial allegation results from an honest mistake, the accusing parent may be relieved that investigators or assessors have all determined that the allegation is unfounded and the child has not been harmed; such cases are less likely to be pursued in court. Cases seem most likely to proceed to trial if there is a difference of opinion among the various mental health professionals and investigators, or if one parent seems especially hostile or emotionally unbalanced and is ignoring the expert opinions.

Judges in family law cases will be reluctant to make a decision that is contrary to the unanimous opinions of investigators and assessors, though they will do so if there is a careful critique that demonstrates bias or lack of competence. Lawyers may have an important role in challenging the opinions of some "experts" in court.[72]

In some cases, there may be divergent expert opinions about whether abuse occurred and the judge must decide which expert opinion to follow. Sometimes, counsel can persuade a judge to discount one opinion, on the basis of a lack of expertise with child sexual abuse assessments or because of bias. Sometimes, the bias of an assessor or investigator may be apparent from the manner in which the professional became "allied" with one parent (often the accusing parent who is usually the first person to contact an investigator) and the unfair or unprofessional treatment afforded the other parent (often the accused parent).[73] In a few reported cases, the "expert" putting forward an opinion has been involved in a therapeutic relationship with one parent and hence is in no position to present an unbiased position about whether or not the child has been abused.[74]

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[71] See e.g., Horner & Guyer, "Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Sexual Abuse Allegations Have Been Made" (1991-92), 25 Fam L.Q. 217 -252; 381-409 & 26 Fam. L.Q. 141-170; Horner, Guyer & Kalter, "Clinical Expertise and the Assessment of Child Sexual Abuse" (1993), 32:5 J. Am Acad. Child & Adol. Psychiatry 925- 931. See also Penfold, "Questionable Beliefs about Child Sexual Abuse Allegations during Custody Disputes" (1997), 14 Can J. Fam.L.11, at 26-29; Fisher & Whiting, "How Valid Are Child Sexual Abuse Validations?," in S.J. Ceci and H. Hembrooke (eds.), *Expert Witnesses in Child Abuse Cases* (Washington, D.C.: American Psychological Association, 1998); McGleughlin, Meyer & Baker, "Assessing Sexual Abuse Allegations in Divorce, Custody and Visitation Disputes," in R. Gelatzer-Levy & L. Kraus (Eds.) *The Scientific Basis of Child Custody Decisions* (New York, John Wiley 1999).

[72] See e.g., *L.T.K.* v. *M.J.K.*, [1991] O.J. 1381 (Ont. Prov. Div.) where Pickett Prov. J. rejected the opinions of the staff at a hospital child abuse clinic that a two-and-a-half year old child had been sexually abused by her father during an access visit. A physical examination by the physicians did not produce evidence of abuse (though that is not unusual even if the child has been abused), and the only source of the "disclosure" was through the mother. The assessors never interviewed the father and the judge characterized the staff as "anything but fair and open-minded." They "grossly overinterpreted innocent behaviour" such as how the child played with anatomically correct dolls.

[73] See discussion in Section 3.2.1 about *D.B.* v. *C.A.S. of Durham Region*, [1994] O.J. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.).

[74] See e.g., *M.K.* v. *P.M.*, [1996] O.J. 3212 (Gen. Div.).

In some cases, the judge must assess the methodology of each of the experts. For example, in *K.M.W.* v. *D.D.W.*,[75] the judge rejected a mother's allegations of inappropriate sexual conduct and permitted the father of a four-year-old child to have unsupervised access. The court severely criticized an assessment conducted by a psychologist, which was characterized as a "blitzkrieg assessment," conducted in six hours on one day. The psychologist, who had been selected with the consent of both parties, asked the child leading questions about the disclosure and relied on his interpretation of the child's play with anatomically correct dolls to come to his conclusion that abuse had occurred. The psychologist ignored the fact that the child also reported that the mother kissed her genital area. The judge preferred the opinion of a child protection worker, who followed the investigative protocol of the institute for the Prevention of Child Abuse, and rejected the abuse allegation. While the protection worker was not technically accepted by the judge as an "expert witness" who was professionally qualified to give "opinion evidence," the judge gave "her testimony great weight," noting that she had 14 years experience. Her interview with the child, following the Institute's protocol, avoided asking leading questions, and posed questions that challenged the allegations. The worker concluded that the child was "highly suggestible" and exposed to "inappropriate sexual material" on television at her mother's home. The child's original "disclosure" to her mother, that her father touched her "peepee," may have been related to the child's diaper rash at the time.

A parent may have an expert critique the work of a court-appointed assessor or state-employed child welfare investigator, in an attempt to persuade the court that the first assessment was incompetently conducted. In *M.T.* v. *J.T.*,[76] parents were involved in custody litigation in which the mother alleged that the child had been sexually abused by the father. A child psychiatrist was appointed by the court to conduct an assessment, but he was not an expert in child sexual abuse. Although the assessor saw the child only once and the child disclosed that the father had done "something bad" to her, the assessor did not pursue this with the child. The assessor concluded that the child had not been sexually abused because she seemed to play happily with her father during an observation session and spoke positively about her father. After this assessment, the child welfare agency conducted its own assessment and two psychologists with expertise in child sexual abuse investigations were retained to critique the first assessment. It became clear that the child was afraid of being alone with her father. In the family law trial, the judge was persuaded that the first assessment was inadequate and concluded that the father had inappropriately touched the child in a sexual manner. The father was permitted limited professionally supervised access.

5.3.7 Are Stronger Legal Remedies Required to Prevent False Allegations?

There are a number of offences that may be committed under the *Criminal Code* by a person who *knowingly* makes a false allegation of sexual abuse, but there are almost no reported Canadian cases for such prosecutions in the context of parental separation. A person who knowingly makes a false statement to a police officer that accuses another person of committing a crime (which would include any situation of child abuse) commits the offence of mischief, contrary to section 140 of the *Code*. If the false allegation resulted in a civil or criminal proceeding in which the person who made the allegation gave evidence, other offences would be committed, including perjury (giving false evidence under oath, section 131) or making a false affidavit (section 138). If the reporter persuaded or misled the child or another person to make a false statement, this would be the offence of obstruction of justice (section 139).

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[75] (1993), 47 R.F.L. (3d) 378 (Ont. Ct. J. - Prov. Div.), per Webster Prov. J.

[76] [1993] O.J. 3379 (Prov. Div) per Hatton Prov. J.. For other cases critical of the role of assessors or child protection investigators; see e.g., *M.K.* v. *P.M.*, [1996] O.J. 3212 (Gen. Div.); *Brigante* v. *Brigante* (1991), 32 R.F.L.(3d) 299 (Ont. U.F.C.) per Beckett J.; and *D.B.* v. *C.A.S. of Durham Region*, [1994] O.J. 643, varied (1996) 136 D.L.R. (4th) 297 (Ont. C.A.).

The difficulty with laying any of these charges is that a prosecution will only succeed if it can be proven beyond a reasonable doubt that the statements were false and that the person making the statement knew it was false. People who make false reports have a defence if they have an "honest belief" in the allegations when made, even if their beliefs were not reasonable.

Key informants were asked if they thought the problem of intentionally false allegations of child abuse required a stronger legal remedy than that which is currently available. Respondents overwhelmingly said no (12 out of 14). One respondent said, "You are taking an emotionally charged issue and trying to remedy it with a criminal penalty—this just will not work." Some respondents said that adequate legislative provisions are already in place, but are not being used. One informant said, "It's there if we want to proceed with charges, but police and child welfare agencies deal with the best interests of the family unit and use other resources." One respondent said obstruction of justice is a broad charge, and therefore it is more useful to prosecutors than would be a provision, if enacted, for a specific offence related to false allegations in the context of custody and access disputes. Two informants thought sentencing could be more punitive in this context.

5.3.8 Would Stronger Legal Remedies Discourage Legitimate Reports of Abuse?

Some lawyers and advocates for women worry that if an allegation of abuse is made that the judge does not accept, the accuser may be "punished" by the court.[77] In particular, they worry that if a custodial mother makes an unproven allegation of abuse against an access father, she may lose custody. There are some reported family law cases where judges have suggested that a custodial parent who makes an unfounded allegation is by that very act harming the child and should therefore lose custody. For example, in one Ontario case the judge commented:[78]

> It is also my opinion that if the allegations of abuse are determined to have been unfounded, then the raising of these allegations by the accuser parent are in themselves the ultimate abuse by that parent against the child, for it spoils or at least shadows, the future relationship that child has with the now proven innocent parent.

There is an understandable concern that this type of judicial response may discourage parents from bringing forward valid concerns of abuse for fear that they might not be able to prove them. There is also concern that parents who make true allegations which are not proven in court may be unfairly punished for bringing these allegations to the attention of the authorities.

While these are legitimate concerns, it would appear that most judges take a sensitive and contextual approach to these cases. Where an allegation of abuse is rejected by a judge, the most common response is to then proceed to a "best interests" assessment, considering the accuser's motive in making the allegation, the reaction of the children to the allegation, and whether the accuser can maintain a positive relationship with the child and the other parent.

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[77] See e.g., Law Society of British Columbia Gender Bias Committee, *Gender Equality in the Justice System* (1992), Vol. II: 5-49.

[78] *Flanigan* v. *Murphy* (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork, M.

When key informants were asked if they were concerned that stronger legal sanctions against reporters of false allegations would discourage legitimate reports of abuse, half of the informants said yes, or there was that risk, and half said no or they did not think it would make any difference. One key informant said, "You would eliminate the people who suspect something is happening but have no evidence." Another said, "No, as long as the statement of sanctions was clear that only allegations made maliciously would be addressed."

5.3.9 Balancing the Interests of Children with the Rights of the Parents

The family law case review suggested that while judges are sympathetic to the rights of accused parents, these rights are a secondary consideration relative to the best interests of the child. Further, judges do not appear to be reducing the parental rights of those who make an honest mistake that results in unfounded allegations. It would appear that, on the whole, judges are not altering custody to "punish" accusing parents after an unfounded allegation is made by a custodial parent. On the other hand, if the accusing parent appears to be mentally unstable or deliberately undermining the relationship of the child with the other parent, these are factors that the court will legitimately consider as a basis for varying custody.

The child's best interests also seem to be weighted heavily in dealing with evidentiary issues. Children rarely testify in family law cases, in recognition of the emotional stress to the child of appearing in court and openly supporting one parent. Instead, judges will often receive hearsay evidence about the child's out-of-court disclosures to parents, social workers or police officers about alleged abuse. Sometimes, one party will introduce a videotape of an investigative interview with the child.

When an abuse allegation is made, the child's safety is a primary concern, but there is also a recognition that children (if there is not actually abuse) also seem to fare better if they maintain contact with both parents in an atmosphere of co-operation (Wallerstein & Kelly, 1980; Maccoby & Mnookin, 1992). Supervised access can help maintain contact between an accused parent and a child while protecting the child from physical or sexual abuse. A person such as a child welfare worker, a volunteer or a relative can provide supervision, or it can be provided through a program operated by a social service agency or visitation centre. A centre or program can offer supervised exchange, on-site supervised visitation, supervised visitation off-site or monitoring through mirrors or cameras. It may also offer court assessments and therapeutic interventions.

The accused parent's right to access to the child is probably an area where it is most likely difficulties and disagreement will occur. All key informants were asked questions regarding limitations on access during investigations. When asked if access rights of non-custodial parents were being denied during typical child abuse investigations, the responses were varied. Half of the respondents said that access rights were denied or limited during the investigation. Three respondents said that access rights could be denied for "awhile," and three respondents said that they did not know or that access was not denied.

Almost all respondents (thirteen) were aware of some possibilities in their jurisdiction for supervised access. Respondents said supervision was provided by child welfare agency workers, contracted workers, court service workers, family members, homemakers, or volunteers from the community. One key informant was aware of a supervised access centre funded by the government or by the parties.

5.4 Social Service Issues

5.4.1 The Role of Therapists and Counsellors in Making False Allegations

It is apparent that in some cases of false allegations, a therapist, counsellor or other "helping professional" (like a shelter worker)[79] has had a critical role in bringing forward a false allegation of child abuse. In some cases, these professionals led the accusing parent to misinterpret statements or the behaviour of the child. Typically, these people are acting in a professionally inappropriate fashion, and outside their area of expertise.

In *M.K.* v. *P.M.*,[80] the mother alleged that the father had sexually abused their six-year-old daughter. Child protection, police and experienced medical investigators all concluded that the allegations were unfounded and that the child's "disclosures were a result of the mother's manipulation and suggestions to the child." However, two mental health professionals testified to support the mother's allegations. Both had been involved in a therapeutic relationship with the mother, one for over two years, and neither had examined the child or the father. They nevertheless came to court and critiqued the work of the independent assessors and investigators, and to express their "professional opinion" that the mother did not "consciously or unconsciously" suggest anything to the child. In rejecting their evidence, Justice Janet Wilson commented:

> Therapeutic counselling and providing objective expert opinion are two very different professional functions...therapeutic contact [with a parent] may make it very difficult for an expert to provide a neutral balanced assessment of a situation. Unless the expert evidence relates to the course of counselling itself, it...may not be very useful.

A parent's therapist is most obviously in a problematic role if that professional comes to court and testifies about the child's condition. Less obvious, but also problematic, are cases in which a therapist may be encouraging a parent to make an unfounded allegation. There are cases involving abuse allegations in which the courts have ordered the accusing parent's therapist to disclose records related to the therapy for possible use in the custody case.[81]

In some cases, it is the child's therapist who has become inappropriately "allied" with one parent in supporting or even inducing unfounded allegations of abuse. In *D.A.B.* v. *J.J.K.*[82] there was ongoing difficulty between the parents of a four-year-old child over access, including concerns by the mother that the father was drinking alcohol during visits. The mother reported to the police and child welfare workers that the child told her that: "Daddy pee-peed in my mouth" and "Daddy punched me." The child was interviewed by investigators three times but was non-communicative and made no disclosure, but on the basis of the mother's statements the child was referred for counselling, and the mother stopped allowing access.

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[79] See e.g., Donna Laframboise, "One-stop divorce shops," National Post, Nov. 21, 1998. She reports on a claim by Ms. Louise Malenfant that over a four year period she had been advocate for 62 individuals in Manitoba who had been falsely accused of child sexual abuse in divorce proceedings, and that in one-third of those cases women's shelters were involved. Ms. Malenfant claimed that shelter workers gave children sessions "educating" them about sexual abuse, and then followed this up with suggestive questioning that resulted in false allegations.

[80] [1996] O.J. 3212 (Gen. Div).

[81] *Smith* v. *Smith* (1997), 32 R.F.L. (4th) 361 (Sask. Q.B.).

[82] [1998] O.J. 27 (Gen. Div.); see also *B.A.* v. *D.M.A.*, [1996] O.J. 352 (Gen. Div.) per Perkins J.

After several months without seeing his son, the father began court proceedings to obtain access. As soon as the mother received the court documents, she again contacted the child welfare authorities and said that her son was ready to talk. A videotaped interview was conducted by the child welfare agency, with the mother present and the therapist taking the lead in conducting the interview. The child was repeatedly asked leading questions by the therapist and was unable to provide any contextual details, or to say what occurred before or after the alleged abuse. At one point in the interview the child says to his mother: "You told me it was Daddy who did that." Later he says: "He didn't do anything else, right Momma?" Throughout the interview the mother is clearly reinforced by the therapist as the source of goodness and the father as the problem, though the child accurately states that the father is a stranger since the boy had not seen him for almost eight months.

Justice Benotto rejected the allegations of abuse, and ordered a schedule of access, starting with short visits progressing towards overnight visitation. The judge believed that the child had been coached by the mother into making the "disclosures." The judge was also highly critical of the child's therapist, who testified at trial and recommended no access, despite the fact that she never met the father or any members of his family. The therapist had told the mother that there was no need for a court-ordered independent assessment, since nothing would be added to her (the therapist's) opinions. The judge criticized the therapist for her "lack of objectivity" and "fundamental misunderstanding...of the respective roles of therapist, investigator and assessor."

In a few cases of the most obvious and serious professional bias and incompetence (as discussed in Section 3.2), professionals may be held civilly liable for their conduct. More commonly, their involvement does not entail liability, but it causes needless anguish and expense to the family.

It would appear that most professionals who work with abuse cases are sensitive and aware of their complexity. There are cases where professionals may have a legitimate difference of opinion about whether abuse occurred. Further, depending on their professional role, some professionals have a legitimate role of support or even advocacy for an accusing parent or child. However, there are some professionals who may have their own psychological or political "agendas," who become inappropriately "enmeshed" in their clients' lives, professionally or personally.

5.4.2 Are the Resources for Supervised Access Adequate?

Information from the literature review, which unfortunately is based on studies primarily from other countries, indicates that the resources for supervised access/visitation do not match the need for the services. According to an American study by Pearson and Thoennes (1998), most visitation supervision is provided by child welfare agency caseworkers, who lack the time to supervise visits as ordered by the courts. Agency supervisors called for a need for supervised visitation in non-office settings and during evenings and weekends. Judges said they need more supervised visitation resources. Two-thirds of visitation program administrators cited lack of funding as a major problem.

Key informants were asked if they thought current supervised access centres were adequate, and only two out of fourteen said yes. Half the respondents said that there were not enough resources and the user-pay services were too expensive and therefore not available to many families. One respondent mentioned the need for after-hours supervision (i.e., evenings and weekends); another said there was a need for court-defined expectations and trained supervisors, and one said there needs to be a standardization of supervised access resources.

5.4.3 Should Supervised Access Workers Provide Assessment and Treatment Services?

While there is agreement in the literature about the need for assessment and treatment services, there is debate on who should be providing these services. According to the Pearson and Thoennes (1998) study, the majority of judges and court administrators (86 percent) indicated that it was "very important" or "somewhat important" that the supervisor advise the court on the validity of the allegations that led to the referral. This helps the court determine suitable custody and visitation arrangements. Visitation supervisors also said they would like to play a more active role by providing feedback about the families to the court (80 percent) and by modelling positive parenting behaviour (60 percent). Program directors, expressed the following concerns about visitation supervisors taking an evaluative role:

(1) whether supervisors are qualified to make recommendations about custody and visitation to the courts;

(2) fear that they would lose their perceived neutrality and thereby reduce their ability to deal effectively with both parents; and

(3) issues regarding liability.

Similar concerns have been raised in England and Wales (Furniss, 1998), where debates have begun over the need for centre evaluations, increased formalization, and increased training and qualifications for staff versus increased supervision for voluntary organizations. It is recognized that risk assessment is more the responsibility of professionals working with the families than untrained volunteers.

5.4.4 Increased Costs to Process Cases Involving Allegations of Abuse

Given the complexity of cases involving allegations of abuse in the context of parental separation, it is not surprising that these cases may be very expensive to process. Many factors contribute to increased costs for all involved, such as:

- longer and more thorough investigations by child protection services and the police;
- assessment services;
- legal costs;

- expert witness costs;
- supervised visitation costs; and
- treatment and support services for parents and children.

Litigation involving allegations of abuse is very expensive and many parents lack the resources to retain experts. If court-appointed assessors or state-paid investigators lack knowledge or skill, or are biased, this may be seriously and perhaps irreversibly prejudicial to the parent and child whose case has been improperly assessed.

If the resources for supervised access are not available and the non-custodial parent cannot afford to pay user fees, contact between an alleged abuser and the child may not be possible.

5.5 Education and Training Issues

5.5.1 Dynamics and Characteristics of Founded and False Allegations of Child Abuse

One study reported that the rate of sexual abuse allegations in families with custody and access disputes was less than two percent (Thoennes and Tjaden 1990). However, it also found that this rate was six times greater than the reported incidence of child sexual abuse in the general population. The authors suggest that child sexual abuse may occur more often in the context of marital breakdown for several reasons. First, the abuse itself may create the marital stress that leads to the breakdown, or the discovery of the abuse may cause the marriage breakdown. Second, the separation may create more opportunities for abuse than were present in the intact family. Third, children may be more likely to disclose abuse by a parent following separation because the abusing parent is less able to enforce secrecy, and the other parent is more willing to believe the child (Thoennes & Tjaden, 1990; Fahn, 1991; Fassel, 1988).

As noted above, several reasons are posited for unfounded allegations following parental separation. According to Green (1991), some actions could be misinterpreted and result in a false allegation. These include misinterpreting normal care-taking practices; misinterpreting normal sexual behaviours in children; misinterpreting common psychological symptoms due to parental separation; and misinterpreting physical signs and symptoms in the child. Penfold (1997) lists other conditions that could cause, or influence, an unfounded allegation of sexual abuse. These include a young child's immature social and communication skills; the presence of other types of family violence; abuse being attributed to the wrong person, or the psychopathology of the child or the parent. Other conditions include the influence of media exposure about sexual abuse on the parent making the allegation; the level of hostility and mistrust between the parents; the child's exposure to pornographic material; the child witnessing adult or animal sexuality; use of leading and coercive interview techniques on the child; excessive interviewing; and poor documentation.

The information in this paper indicates that most cases involving unfounded allegations of abuse are due to honest mistakes and poor communication rather than deliberate lies or manipulation. Parents need information about the effects of parental separation on children and training to improve communication to help reduce the number of unfounded allegations and help children cope better with their situations.

5.5.2 Lack of Training for Professionals Involved in Investigating Cases of Alleged Abuse

Understanding and knowledge about allegations of child abuse in the context of parental separation is a developing field. Little research has been conducted, and much of the information published by the media is biased and reports on atypical cases.

The very limited information we have from the key informants is that most (six out of seven child welfare workers and police officers) said their organization did not provide specific training on the dynamics involved with allegations of child abuse in situations of parental separation. Key informants suggested more education of assessors, mediators, child welfare workers, shelter workers, police, lawyers and judges, as well as parents. They also called for an improvement in the quality of the investigative process, including proper interviewing techniques, and handling cases more expeditiously.

There is a clear need for applied child development and psychological research to help police, child protection workers, assessors and other mental health professionals more effectively distinguish founded from false allegations. Judges and lawyers also need more educational material and programs dealing with these extremely challenging cases.

6.0 STRATEGIES FOR DEALING WITH ALLEGATIONS OF CHILD ABUSE IN THE CONTEXT OF PARENTAL SEPARATION

The discussion in Chapter 5.0 indicates there are a number of issues related to child abuse allegations in the context of parental separation. In developing strategies to deal with these issues, it is important to recognize that some problems are inherent in this type of case (e.g., cases will continue to be time consuming to investigate due to their complexity and cases will continue to be expensive to process). The only way to address these issues is to reduce the incidence of false and unfounded allegations.

Some issues, primarily those dealing with education and training needs, can be addressed now. All professionals working with cases involving allegations of abuse, including child welfare workers, police, psychologists, lawyers and judges, need educational materials or training in dealing with high conflict separations, particularly with the special challenges that arise when allegations of abuse are made. This education should be ongoing and updated as new research information is available. Further, parents should be provided with information about the dynamics of parental separation and its effects on children. General information about abuse should be provided as part of "parenting after separation" education programs, with more detailed information given to individual parents as appropriate.

There are also some issues that we do not yet have enough information about (particularly Canadian information) to make informed policy decisions. These issues require research and study before appropriate responses can be formulated. Issues such as whether stronger legal remedies for dealing with false allegations are required cannot be properly addressed without undertaking further research.

Table 3 presents a summary of the issues discussed in Chapter 5.0, together with a suggested strategy for dealing with them. These strategies are discussed in more detail in the next section.

6.1 Research Regarding Allegations of Child Abuse

Several issues could be addressed by conducting a number of specific research studies, and following up on current research.

Canadian Incidence Study of Reported Child Abuse and Neglect

The lack of information regarding the incidence of allegations of child abuse should be addressed by conducting secondary analyses of the data from the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS). Analyses of these data would indicate the incidence of abuse allegations when parents have separated, as well as the portion of these cases that involve intentionally false allegations. Questions contained in the CIS include, "Is there an ongoing child custody dispute at this time?" and "If unfounded, was report a malicious referral?" The CIS could also provide national information on the source of the allegation, the identity of the alleged perpetrator, and duration of the abuse (i.e., single incident, under six months, over six months). Data were ready for analysis upon completion of the contract with Health Canada, March 31, 2000. If data on these issues are not analyzed as part of the final report for Health Canada, the Department of Justice Canada should consider funding secondary analyses of the data.

Table 3: **Summary of Issues Related to Allegations of Child Abuse in the Context of Parental Separation and Suggested Strategies for Dealing with Them**

Issue	Strategy
Research Issues	
• Incidence of false and unfounded allegations of child abuse.	• Conduct research study to inform professionals and for policy development.
Investigative Issues	
• Need for education and training for professionals.	• Resources and educational materials.
• Length of time required to investigate cases involving allegations of child abuse.	• More resources.
• Availability of protocols for investigating these cases.	• Develop protocols.
Legal Issues	
• Unfounded allegations: misunderstanding, fabrication or mental disturbance?	• Need thorough assessment by trained professionals.
• Children making false allegations.	• Need thorough assessment by trained professionals.
• Effect of unfounded allegations on family law decisions.	• Conduct research study.
• Dealing with uncertain outcome.	• Improve mechanisms for supervised access and support for children; legal representation for children.
• Children's evidence.	• Education and training.
• Role of assessors and experts.	• Need thorough assessment by trained professionals.
• Are stronger legal remedies required?	• Conduct research study to inform policy development.
• Would stronger legal remedies discourage legitimate reports?	• Conduct research study to inform policy development.
• Balancing the protection of the child with the rights of the parent.	• Improve mechanisms for supervised access.
Social Service Issues	
• Role of therapists and counsellors.	• Education and training.
• Are the resources for supervised access adequate?	• Conduct needs assessment study.
• Should supervised access workers provide assessment and treatment services?	• Conduct needs assessment study.
• Increased costs to process cases involving allegations of abuse.	• More resources.
Educational and Training Issues	
• Dynamics and characteristics of founded and false allegations of child abuse.	• Education and training. • Conduct research.
• Lack of training for professionals involved in investigating cases of alleged abuse.	• Education and training.

Tracking Study

Issues regarding the nature, outcome and processing of cases would best be addressed by a detailed tracking study of custody and access cases in Canada that involve allegations of child abuse. A tracking study could examine the following issues: when the allegation is first made; whether an allegation is founded, undetermined, intentionally false, or false due to an honest mistake or mental disturbance; whether access rights of non-custodial parents are being denied during investigations; what access supervision services are being utilized; whether false allegations of child abuse are being made repeatedly in the same case; whether children are being coerced or manipulated by custodial parents to make accusations against non-custodial parents; the length of time needed to resolve these cases; and the extent to which there are multiple proceedings (i.e., criminal, family law, and child protection) involving the same situation. This type of research must focus not only on cases resolved by a trial, but also on the cases that are discontinued or settled, either because it becomes clear that the allegation is unfounded or because it is clear that the abuse occurred and the perpetrator does not seek a trial. A tracking study based on case files with a two-year follow-up would capture the majority of cases.

Issues regarding balancing the protection of the child with the rights of the parent could be addressed by conducting the following types of studies.

Needs Assessment Study

A national study on the types of supervised access services available could be conducted to determine what kinds of programs and services are available in Canada and whether any program gaps exist. Practices from some of the better programs could be assessed and information about them disseminated.

The issue of whether supervised access services should provide assessment or treatment services also needs further investigation and could be explored in a needs assessment study. While most professionals agree that more assessment and treatment services are needed, it is unclear whether supervised access centres should be providing these services. Supervised access centres and programs are seen as a necessary short-term solution to maintaining contact between parent and child, but they work best when they complement other services. It has been suggested that rather than providing assessment or therapeutic services, access centres should provide referrals to needed services.

6.2 Improved Education and Training

Issues of inconsistencies in investigative processes and lack of knowledge among parents and professionals in cases involving allegations of child abuse could be addressed by developing education and training programs.

It was clear from both the literature review and the limited interviews with key informants that any allegation of child abuse must be treated seriously and assessed accordingly, regardless of whether it occurs during a custody and access dispute. There is a clear need for applied child development and psychological research to help police, child protection workers, assessors and other mental health professionals more effectively distinguish founded from false allegations. Judges and lawyers also need more educational materials and programs dealing with these extremely challenging cases. Information from researchers must be incorporated into training and educational materials that are available for professionals in Canada.

There is also a need to educate parents on issues of child abuse, as well as the effects of divorce on children. The findings of this study indicate that most cases involving unfounded allegations of abuse are due to honest mistakes and poor communication rather than deliberate lies or manipulation. Educating parents who have separated about the effects of parental separation on children, and training with the objective of improving communication, should help to reduce the number of unfounded allegations and help children cope better with their situations.

6.3 Supervised Access Services

The literature from other jurisdictions suggests that there is a need for more resources to deal with cases where there is a legitimate concern about the risk of harm to children. The supervised access services that do exist in Canada need stable funding, since the services are too expensive for many families. Centres need trained supervisors and suitable space, and families require "after hours" supervision (i.e., evenings and weekends).

Further, there appears to be a need for standardization of supervised access and court-defined expectations. In terms of standards for supervised access centres, information from other jurisdictions suggests that centres should promote the safety and welfare of children, and of vulnerable parents during supervised exchange and visits; facilitate child/parent and child/sibling interaction while contact is taking place; and, where appropriate, work towards the independent management of contact by the parties. Standards should also specify the type and structure of services, administrative functions, staff and required qualifications, intake, operational procedures, safety and security measures, confidentiality, reports, and whether to provide reports of the observations of the child during the visit to the court.

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APPENDIX A
ALLEGATIONS OF CHILD ABUSE IN THE CONTEXT OF PARENTAL SEPARATION

Interview Protocol

Introduction

[Self-identification by interviewer]

The Canadian Research Institute for Law and the Family is currently conducting a project for the Department of Justice Canada on the problem of false allegations of child abuse made in the context of custody and access disputes. One component of this project is key informant interviews to provide additional insights into the problem.

1. Are you willing to answer some questions about this topic? (This will take approximately 15 minutes. All information will be presented anonymously, and key informants will only be named in the acknowledgements of the report with their permission.)

   __________ [If yes, continue -- If no, thank the respondent and end the call]

2. What is your profession? ____

Extent of the Problem

Unfortunately, the actual incidence of false allegations of child abuse in Canada is not known and would require primary research to determine. It is believed that the incidence is higher in situations of parental separation than in other contexts, but this has not been verified.

3. Have you had direct experience with cases of false allegations of child abuse in custody and access disputes? If so, how much and what types of cases (e.g., physical, sexual, neglect)?

   ____
   ____
   ____
   ____
   ____
   ____

4. Obviously, there is a distinction between false allegations that are deliberately made to gain a tactical advantage in a custody or access dispute from those that are honest mistakes due to such things as: children's statements being misinterpreted, poor communication between the parents, mental health problems of the person making the allegation, or children making false allegations. The Report of the Special Joint Committee on Child Custody and Access has recommended that "the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury. Have you had cases that could be classified as "clear cases of mischief, obstruction of justice or perjury"? If so, how often does this occur?

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5. Do you think that the incidence of intentionally false allegations (or clear cases of mischief, obstruction of justice or perjury) is higher in cases involving custody and access disputes than in other settings?

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6. Do you think that the incidence of false allegations due to honest mistakes is higher in cases involving custody and access disputes than in other settings?

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7. Do you think that the problem of false allegations has increased compared to ten years ago? What about intentionally false allegations?

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8. In your experience, are intentionally false allegations of child abuse being made repeatedly in the same case (i.e., with the same family)?

9. Who makes the intentionally false allegations in most cases (i.e., was the original allegation made by the mother, father, child)?

10. In your experience, are children being coerced or manipulated by custodial parents to make accusations against non-custodial parents?

11. Do you think that the problem of intentionally false allegations of child abuse requires a stronger legal remedy than that which is currently available? Please explain.

12. Do you think that stronger legal sanctions against reporters of intentionally false allegations would discourage legitimate reports of abuse?

[If key informant is a child welfare worker or police officer, continue asking questions 13-18. If key informant is another profession, skip to question 19 and continue]

Investigative Processes [child welfare workers and police]

13. Does your organization have a protocol for responding to allegations of child abuse in the context of custody and access disputes? If so, may we have a copy? [If yes, make arrangements -- fax or courier pick-up]

14. In practice, are there cases with special circumstances where the written protocol is not applicable? If so, what are they?

15. Does your organization provide specific training on the dynamics involved with allegations of child abuse in situations of parental separation?

16. When an allegation of child abuse is made, how long do you have before you must begin an investigation?

17. How long does an investigation typically last (in terms of elapsed time, not actual investigative hours)?

18. Are statements that are taken from the reporter sworn statements?

19. In your experience, are access rights of non-custodial parents being denied during investigations? If so, on average, for how long might a non-custodial parent be denied access?

20. Are you aware of mechanisms in place in your jurisdiction for supervised access visitations?

21. Do you think that the current mechanisms for supervised access are adequate? If not, what mechanisms should be available?

22. Are they any other issues regarding this problem that you would like to raise?

Thank you very much for your time and input. May we acknowledge your assistance in the report?

__________ [If yes, get proper spelling of name, title and affiliation]

Would you like to receive a copy of this report when it is completed?

__________ [If yes, get address, or give the Department of Justice contact]

For your information, the Department of Justice Canada contact for this project is:

Ms Tracy Perry
Tel: (613) 957-7093
e-mail: tracy.perry@justice.x400.gc.ca

APPENDIX B
SELECTED BIBLIOGRAPHY ON ASSESSING ALLEGATIONS OF CHILD ABUSE

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